United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,346

United States Court of Appeals
For the
District of Columbia Circuit
FILED APR 10 1958
Joseph W. Stewart
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MILTON E. CANTER,
and
LOUIS UROW,
Appellants,

v.

35

JAMES C. TOOMEY,
Temporary Receiver of Defendant
Blundon Investment Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS UROW
MILTON E. CANTER
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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether beneficiaries of a deed of trust securing an obligation of a corporation may properly be required to bear the expenses of a temporary receivership of the corporation, imposed after default in the deed of trust, where the beneficiaries neither sought, acquiesced in, nor benefited from, the temporary receivership.

2. Whether, in view of evidence that a temporary receivership was invalid and improvident, and that the temporary receiver was negligent and derelict in his duties, it was an abuse of discretion to award the temporary receiver full compensation, particularly where the court refused to consider such evidence.

3. Whether it was an abuse of discretion to award a temporary receiver of a corporation the full compensation sought by him for the following activities: an unauthorized and groundless attempt to have set aside a foreign judgment against the corporation; hopeless and futile attempts to sell heavily encumbered real estate of the corporation; obtaining unwarranted, and subsequently dissolved, injunctions restraining advertised sales of property of the corporation under unchallenged deeds of trust.

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STATUTE CITED

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,346

MILTON E. CANTER and LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY, Temporary Receiver of
Blundon Investment Corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is invoked under Title 28, Section 1291, of the United States Code, June 25, 1948, 62 Stat. 929, to review two final orders entered in a proceeding in the District Court, granting the petition of a receiver for compensation, and directing that it be paid by interveners therein.

STATEMENT OF THE CASE

This is an appeal by Milton E. Canter and Louis Urow, beneficiaries of a deed of trust given by Blundon Investment Corporation, from two orders awarding compensation to James C. Toomey, temporary receiver of the corporation, and directing appellants to pay one half of that compensation (App. 45, 46).

Appellants have no interest in the litigation in which the receiver was appointed. They neither sought, acquiesced in, nor benefited from, the receivership. Appellants were original counsel for the corporation in the litigation, but withdrew prior to the filing of the motion upon which the receiver was first appointed (App. 5). Appellee receiver has served as his own counsel in the receivership.

The complaint in the principal litigation was filed by an alleged stockholder on February 10, 1954. It alleges fraudulent misrepresentations inducing the purchase of stock, and seeks damages from the corporation and others, and the appointment of a receiver pendente lite and permanently (App. 1-3). The corporation has denied the material allegations of the complaint (App. 3-5), and the cause is still pending.

The motion upon which the appellee was first appointed, on November 4, 1954, was not brought by the plaintiff, nor was it founded upon any of the allegations of the complaint. It was brought by a co-defendant, Ben Lindas, apparently without notice to the corporation, and predicated entirely upon the institution of an action in Virginia by a stockholder seeking recovery of lands conveyed to the corporation (App. 5-6). Lindas had formerly been president of the corporation, but had resigned under fire on February 23, 1954 (App. 9, 13-14). His position in the litigation was adverse to the corporation (App. 6, 8-9, 12).

The order of appointment directed the receiver to conserve the property of the corporation, and to enter his appearance in its behalf in any pending litigation (App. 6-7). The receiver, however, did nothing to preserve that property, and failed to appear for the corporation in any of the causes to which it was party. (He did file, without authorization, a motion to set aside appellants' judgment on the note secured by their deed of trust, which was denied by the United States District Court for the Eastern District of Virginia as wholly without merit (App. 43-45); for this he was awarded a substantial fee (App. 32-35) at appellants' expense.) Nothing done by the receiver has resulted in the slightest benefit to the corporation, its stockholders or its creditors. On the contrary,

his actions have caused irreparable damage to the corporation, the appellants, and other creditors.

On January 16, 1956, on oral motion without notice, the receiver was removed and immediately reappointed (App. 14-15). This extraordinary maneuver was instigated by the receiver in an effort to acquire jurisdiction of the property of the corporation in Virginia, of which he had been divested by failing to comply with Title 28, section 754, of the United States Code (page 7, infra). The orders appear to have been drawn by the receiver, but not to have been served by him upon anyone. They recite that they were issued on the motions of Ben Lindas, individually and as president of the corporation.

The record is replete with pleadings by Lindas, filed prior to these motions and served upon the receiver, stating that he had resigned as president of the corporation on February 23, 1954. One such pleading was filed only nine days before these orders were entered (App. 13-14). Others actually set out Lindas' letter of resignation (App. 9-10, 13), and fully demonstrate the impossibility that he could have represented the corporation in this litigation: they admit the allegations of the complaint (App. 6); they assert cross-claims against the corporation (App. 9); and they charge the corporation with having blackmailed and having instituted criminal proceedings against him (App. 8). The receiver has done nothing to disabuse the court of the misapprehension that the corporation, by its president, had consented to the receivership upon which his appointments appear to have been founded (App. 49-50, 52, 53-54, 62, 63).

The corporation, chartered in Delaware, owned two tracts of land in Virginia, where it is domesticated, known as "Burgess Farm" and "Old Church Tract", both subject to appellants' deed of trust. On "Burgess Farm", by far the more valuable of the tracts, appellants' deed constituted a second trust. There was also a third trust and numerous judgment liens upon the property. None of these encumbrances have ever been questioned by the receiver. In the aggregate, they greatly exceed the value of the property (App. 27-28). Appellants' deed of trust was in default prior to the initial appointment of the receiver.

The receiver twice caused sales advertised under appellants' deed of trust, and also under the first deed of trust on "Burgess Farm", to be restrained, upon averments that the property was involved in the principal litigation, that its value substantially exceeded the obligations secured, and that such sales would cause irreparable damage to the parties to the litigation (App. 10-11, 15-16). On October 25, 1956, the court granted a preliminary injunction against such sales, over the opposition of appellants' trustee (App. 17-19) and, sua sponte, directed the receiver expeditiously to sell the property (App. 19-20). On January 12, 1957, the receiver obtained a contract for the sale of "Burgess Farm" for $29,600, free and clear of liens. He was unable to consummate the contract, that price being insufficient to meet the encumbrances on the property, but nevertheless declined to consent to the lifting of the injunction. (The receiver apparently never obtained an appraisal of "Old Church Tract", or attempted to secure a purchaser for it.)

On September 6, 1957, appellants intervened for the purpose of moving for the vacation of the receivership and the dissolution of the injunction (App. 28-29, 22-25). No opposition to the motion was filed. The court refused to vacate the receivership, but dissolved the injunction, on the condition, however, imposed sua sponte, that the receiver be compensated out of the proceeds of sales under the deeds of trust (App. 31). The court declined to hear appellants' objections to this condition, ruling that such arguments should be reserved for the hearing on the receiver's petition for compensation.

Thereupon the receiver filed a petition for compensation, with annexed statement of services (App. 32-35), to which appellants filed a detailed opposition (App. 35-43). At the hearing on the petition the court, without having either read appellants' papers in opposition (App. 48) or heard their argument, stated that it would not consider arguments that the appointments of the receiver were invalid or improvidently made (App. 51-52), or that the receiver should receive no compensation (App. 48); that it was not concerned with the details of the receiver's activities,

since it had no doubt that he had exercised sound judgment (App. 52); and that the only issue before the court was the amount of the receiver's fee (App. 48, 55). Appellants' efforts to acquaint the court with the basis of their attacks upon the receivership and upon the conduct of the receiver were rejected (App. 53-54, 56, 57-59), as was the contention of the corporation that the receivership costs should be paid by those who sought the receivership (App. 60).

The court ruled that the corporation had consented to the receivership (App. 62, 63); that the receiver had acted with great diligence and considerable skill (App. 62); and that all the services of the receiver which had been questioned were necessary and properly rendered (App. 63). It ordered that the receiver be compensated in the amounts of $2,910.00 for services, and $214.34 for expenses, as prayed, payable out of the proceeds of the sales which it had previously restrained, the compensation to be an expense of the sales, and to be paid prior to distribution of the proceeds to the beneficiaries of the deeds of trust (App. 45).

Shortly after the ruling of the court upon the petition for compensation, but prior to the entry of the order thereon, "Burgess Farm" was sold under the first deed of trust. After satisfaction of the claim of the trustees, and crediting the remainder of the purchase price to the obligation of the corporation to appellants, there will still be owing to appellants under their deed of trust an amount in excess of $10,000, which cannot be realized out of the remaining assets of the corporation. The court decided that it would be inequitable to require the appellants to bear all the costs of the receivership, and, in a supplementary order, directed that they share them with the beneficiaries of the first trust (App. 46).

STATEMENT OF POINTS

The Court below erred as follows:

(1) In directing appellants to pay one half of the costs of the receivership.

(2) In refusing to impose the costs of the receivership upon the parties who secured it.

(3) In refusing to hear argument that the receiver was not entitled to any compensation.

(4) In refusing to hear argument that the appointments of the receiver were void or voidable.

(5) In refusing to hear argument that the appointments of the receiver were improvident.

(6) In refusing to deny the receiver compensation, on the ground that he has been party to a deception of the court as to the consent of the corporation to the receivership.

(7) In refusing to deny the receiver compensation, on the ground that his appointments were improvident and void.

(8) In refusing to deny the receiver compensation, on the grounds that he has been improvident and negligent, and that he has accomplished nothing for the benefit of the corporation, its creditors, or its stockholders.

(9) In allowing the receiver compensation for services in connection with an unauthorized and unsuccessful attempt to set aside a judgment against the corporation.

(10) In allowing the receiver compensation for services in connection with unsuccessful attempts to sell the real estate of the corporation.

(11) In allowing the receiver compensation for services in connection with injunctions obtained by him which were subsequently dissolved.

(12) And for such other errors as may be apparent from the record or which may come to the attention of the Court of Appeals.

STATUTE INVOLVED

The Act of June 25, 1948, c. 646, 62 Stat. 923, Title 28, Section 754, U.S.C.A., provides, in part, as follows:

> "Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control of all such property in that district."

RULE INVOLVED

Rule 7, Section (1), Subsection (b), of the Federal Rules of Civil Procedure, provides, in part, as follows:

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

SUMMARY OF ARGUMENT

The court below improperly directed the appellants to pay one half the costs of the temporary receivership. The appellants have no interest in the litigation in which the receiver was appointed, and neither sought, acquiesced in, nor benefited from, the receivership. They are beneficiaries of a deed of trust given by the corporation in receivership to secure a note. Neither the note nor the trust have ever been questioned by the receiver, and appellants' lien upon the property of the corporation was not affected by the creation of the receivership.

The receiver should not have been granted compensation from any source, since both his appointments were invalid and improvident. The movant was not a judgment creditor of the corporation, and his original motion, which was not served upon the corporation, was based upon the untenable ground that the right of the corporation to its property was be-

ing litigated in a state court. Upon subsequent oral motions by the same movant the receiver was removed and immediately reappointed. The corporation received no notice of these motions, and the basis upon which they were granted is not disclosed by the orders thereon. Throughout the proceeding the appointing court has been under the misapprehension that the corporation assented to the receivership, although it is clear from the record that the corporation was neither notified of the motions therefor, nor represented at the hearings thereon.

The receiver should not have been granted any compensation on the further ground that he has been derelict in his duties to the court. He neglected to advise the court that the corporation had not consented to the receivership. He caused advertised sales under deed of trust to be enjoined, upon the misrepresentation that the principal litigation would be affected by such sales. He represented to the court that he could negotiate a sale of the property advantageous to the corporation, when he knew that the encumbrances thereon exceeded its fair value. He failed to comply with the order of the court to enter his appearance in pending litigation. He has continued the receivership for more than three years, although it was apparent from the outset that it could serve no useful purpose. None of these, and other, criticisms of the receiver and the receivership was considered by the court in granting the receiver the full compensation requested.

Approximately half the compensation allowed the receiver, amounting to about $1,500, was for an unauthorized, unwarranted and unsuccessful attempt to set aside appellants' judgment on their note. The balance of the compensation was largely for futile efforts to sell the property of the corporation, under an invalid and improvident order, and for securing improvident injunctions, which were later dissolved. An allowance for any of these activities was an abuse of discretion.

ARGUMENT

POINT I

IT WAS ERROR FOR THE COURT TO ORDER APPELLANTS TO PAY HALF THE COSTS OF THE RECEIVERSHIP.

The appellants neither sought, acquiesced in, nor benefited from, the receivership. Neither they, nor any other secured or judgment creditors of the corporation,had any interest in the receivership, or in the litigation which gave rise to it. The respective motions for the appointment of a receiver were not served upon them; they did not participate in the hearings thereon; and the respective orders appointing the receiver were not served upon them. They were never put upon notice that the receivership was being conducted at their expense.

Appellants' lien upon the property of the corporation had vested prior to the appointment of the receiver. Its validity has never been questioned by him (App. 45), and it is undisputed that whatever jurisdiction the receiver may have acquired over the property of the corporation was subject to that lien. Far from resulting in any advantage to the appellants, the receivership has caused them irreparable loss and great inconvenience. They have had their attempts to realize upon their security restrained (App. 11-12, 16-17, 19-20). Thereafter they have seen the value of that security decline, while delinquent interest increased. They have been compelled to retain counsel to defend an attempt to have their judgment against the corporation set aside. And they have been constrained to intervene in the principal litigation to protect their rights.

Under these circumstances it is contrary to all the law, and wholly repugnant to right and reason, to require appellants to bear any part of the costs of the receivership. (Aetna Life Insurance Co. v. Leonard, 186 F. 148; Spencer v. Taylor Creek Ditch Co., 194 F. 635; 104 A. L. R. 991-992, 996; 45 Am. Jur., Receivers, sec. 277; Clark on Receivers

(2d Ed.), secs. 641, 852). To compel them to do so is to take their property without due process of law (Nicholson v. Western Loan & Building Co., 60 F.2 516), and to impair the integrity of their contract with the corporation (Merchants Loan & Trust Co., v. Chicago Ry. Co., 158 F. 923).

The court gave no reason for selecting the appellants to bear these costs, or for absolving, ipso facto, the holder of a third trust and other secured creditors from sharing the burden. It simply said that, obviously, the receiver should be compensated (App. 63). Apparently the court cast about for means toward this end, and observing that appellants were effectively immobilized by the injunction, seized upon their contingent interest in the property of the corporation as a felicitous source, and conferred it upon the receiver, pro tanto. Although the question of whether the injunction should continue had no connection with the compensation of the receiver, dissolution of the injunction was conditioned upon diversion of the proceeds of sales to the compensation fund (App. ~~45~~ 31).

For the reasons set forth in the next Point, appellants contend that the receiver should obviously not be compensated. Assuming, however, that some basis for compensation exists, it is submitted that it should be assessed upon those who sought the receivership, and for whose sole benefit it was created (45 Am. Jur., Receivers, sec. 292; Clark on Receivers, (2d Ed.) sec. 849). This is particularly true if, as urged below, the appointments were erroneous, improvident or otherwise improper, (Bowersock Mills & Power Co. v. Joyce, 8 Cir., 101 F.2 1000; 45 Am. Jur., Receivers, 1957 Cum. Supp., sec. 296). The summary rejection of the proposal, both by the appellants and by counsel for the corporation,that the court make such an assessment, was manifest error (App. 60, 64).

POINT II

IT WAS ERROR FOR THE COURT TO AWARD THE RECEIVER ANY COMPENSATION.

It was an abuse of discretion for the court to award the receiver any compensation whatever, let alone the full compensation requested for all activities described in his statement of services (App. 32-35).

(1) The appointments of the receiver were invalid and improvident.

The receiver was first appointed on November 4, 1954, upon the allegations of Ben Lindas, a co-defendant in the principal litigation, that a suit had been filed in a state court seeking the return of property of the corporation to a former owner (App. 5-6). That a receiver may not be appointed where rights to the property sought to be conserved are being litigated in a state court has been enunciated by the United States Supreme Court (Kelleam v. Maryland Casualty Co., 312 U.S. 377, 61 S. Ct. 595, 85 L. Ed. 899); consequently, the granting of the receivership on the ground alleged was improper. Further, the corporation was never advised of the filing of the motion, and was not represented at the hearing thereon. Appellants' contentions to this effect in their papers in opposition to the petition for compensation (App. 38-39), and, earlier, in the opposition of their trustee to a motion for a restraining order (App. 19), and their motion to dissolve a preliminary injunction (App. 24), have never been denied. The courts have uniformly held that so drastic is the ex parte appointment of even a temporary receiver, that only under the most extraordinary conditions will it be permitted (Marion Mortgage Co. v. Edmunds, 64 F. 2d 248, 251. See also, Central West Public Service Co. v. Craig, 70 F. 2d 427; Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F. 2d 400; 45 Am. Jur., Receivers, secs. 87, 90). Here the corporation was readily available for service, and there was no justification for the peremptory action of the court.

There is yet a further reason for setting aside the appointment of

the receiver. It has been held that the equitable remedy of receivership will not be granted to one who has not reduced his claim to judgment and exhausted his remedy at law. (Shapiro v. Wilgus, 287 U.S. 348, 53 S. Ct. 142, 77 L. Ed. 355). To have taken from the corporation the control of its property, and to have held at bay the creditors of the corporation, at the behest either of the defendant Lindas or of the plaintiff in the principal litigation, was a clear abuse of discretion.

The receiver was removed and reappointed on January 16, 1956, again upon the motions of Lindas (App. 14, 15), and the statement of services is composed almost entirely of activities conducted thereafter (App. 32-35). The second appointment is subject to all the defects inherent in the initial appointment. In addition, there are two fundamental errors of even greater import. Where the first appointment was on written motion, but without actual notice to the corporation, the motions of January 16, 1956, were not only without notice, but entirely oral, in flagrant violation of Rule 7 (1) (b) of the Federal Rules of Civil Procedure (page 7 , supra). "....An order made on oral motion not in the course of hearing or trial is erroneous for want of notice." (Barron & Holtzoff, Federal Practice and Procedure, 1950, ch. 7, sec. 244, citing In re J. & M. Doyle Co., 130 F. 2d 340). The furtiveness of this maneuver was compounded by failure to serve the resultant orders upon anyone (App. 14, 15). While the orders do not vouchsafe the reasons which impelled their issuance, it is impossible to conceive of circumstances justifying a simultaneous removal and reappointment of a receiver without notice to the parties most concerned.

The United States District Court for the Eastern District of Virginia at Richmond found the events of January 16, 1956, to have been a belated effort of the receiver to meet the requirements of Title 28, sec. 754, of the United States Code (App. 44), and thus to acquire jurisdiction of the property of the corporation in Virginia. It is submitted that this collusive tactic, aimed at the evasion of a federal statute, should not have been countenanced by the court. Far more serious, however, is the fact

that the court was under the material misapprehension that the corporation, through Lindas as president, was party to the motions of January 16, 1956 (App. 49-50, 52, 53-54, 62, 63).

Pleadings previously filed by Lindas himself state that he had resigned as president of the corporation on February 23, 1954 (App. 13-14), and even incorporate his letter of resignation (App. 9-10, 13). His hostility to the corporation in the principal litigation is amply demonstrated by his answer admitting the allegations of the complaint (App. 6), his cross-claims against the corporation (App. 9), and his charges that he had been maligned and persecuted by it (App. 8). Appellants' contention that at no relevant time did Lindas represent the corporation in this litigation is reiterated throughout the record (App. 19, 24, 38-39), and has never been disputed by the receiver, the corporation or Lindas.

That the appointment of January 16, 1956, and apparently the appointment of November 4, 1954, as well, was predicated upon the belief that the corporation had assented thereto, is abundantly clear (App. 49-50, 52, 53-54, 62, 63). It may well be assumed that absent that belief the appointments would not have been made, at least without affording the corporation an opportunity to be heard. Upon the showing, therefore, that the corporation had not consented to the receivership, the appointments should have been declared void ab initio, and the receiver, as a consequence, denied compensation (Lion Bonding & Surety Co. v. Karatz, 262 U.S. 77, 43 S. Ct. 480, 67 L. Ed. 87).

Appellants earnestly attempted to acquaint the court with these matters, and to urge them as grounds for denying the receiver any compensation whatever. But without having either read appellants' opposition papers (App. 48), or heard their argument, the court declared that it would not consider their contentions that the receivership was invalid and improvident (App. 51-52), or that the receiver should receive no compensation (App. 48). As to the appointments of the receiver, the court declared that it would not vitiate its own act (App. 52, 54, 58), and refused to hear appellants either on their invalidity (App. 53-54, 58) or

improvidence (App. 58-59). "There is no law of the case in interlocutory decisions in this jurisdiction." (Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, aff'd 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153), and hence no question that the court had the power to reconsider its orders of appointment. Its refusal to do so under these circumstances must be regarded as an abuse of discretion. As to the compensation of the receiver, the court stated that it had already decided that he should be compensated, and that the only issue before it was the amount of his fee (App. 48, 52). This prejudgment of the basic issue as to whether, under the circumstances, the receiver should receive any fee, was wholly arbitrary.

It may be noted that the failure of the receiver either to give notice of the motions of January 16, 1956, or to serve the resultant orders upon anyone, effectively negated the possibility of a timely appeal, and that the appellants challenged the receivership immediately upon their intervention (App. 24). The court observed that no one but the holders of the trusts were objecting to the compensation of the receiver. That is hardly remarkable, since they alone had been directed to pay it. And it cannot fairly be maintained that the validity of the receivership was not their concern, where compensation of the receiver depended upon it, or that they had no standing to challenge the validity of the receivership upon the receiver's petition for compensation, where it was proposed to saddle them with the payment of that compensation. (See McGrath v. Cliff, 198 Okla. 644, 181 P2d 555).

(2) The receiver was derelict in his duties.

The receiver was derelict in his duty to apprise the court of all essential facts, to comply with the terms of the appointing order, and to conserve the corpus of the estate. On that account he should not be compensated. (United States v. Johnson, 98 F. 2d 462. See also Harkin v. Brundage, 13 F. 2d 617, rev'd on other grounds, 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457; Close v. Brictson Mfg. Co., 49 F. 2d 751.).

The receiver has not denied that the orders of January 16, 1956, reciting that they were issued upon the motions of Lindas, individually and as president of the corporation, were drawn by him. It is scarcely possible that he was unaware that Lindas was not then the president of the corporation, or its representative for any purpose, in view of the record of the pleadings which Lindas had served upon him, the last one being only nine days before the orders were granted (App. 13-14), and of the implicit recognition in the incomplete certificate of service upon the orders that the corporation was then represented by local counsel (App. 14, 15). Be that as it may, he certainly was aware of it at the hearing on his petition for compensation, since the position of Lindas was set out in great detail in appellant's opposition papers (App. 39). Yet the receiver deliberately abstained from correcting the misapprehension of the court at the hearing (App. 49-50, 52), and the court continued to rely upon it (App. 53-54, 62, 63).

The receiver has been less than candid with the court in a number of other respects. Thus on two occasions he obtained orders restraining advertised public sales under appellants' deed of trust, upon the representation that the property encumbered was involved in the principal litigation (App. 10-11, 15-16), whereas that litigation is essentially an action for alleged fraudulent sale of stock (App. 1-3). He advised the court that he could negotiate a sale of the corporation's property which would provide a surplus after the satisfaction of existing liens, and thereupon obtained preliminary injunctions against sale under deeds of trust, and permission to enter into a contract. Yet at the very outset of the receivership he was advised by appellants (App. 50), and should have discovered for himself, that he could not do so. Directed to sell the property expeditiously (App. 20), the receiver did not even obtain an appraisal of one of the two tracts involved, and consumed many months in obtaining a contract for the other tract. And having gained approval of a contract for the sale of that tract, he continued to assure the court that he could consummate the contract -- long after obtaining a title search which

clearly demonstrated that the contract price was inadequate to satisfy the existing encumbrances (App. 27-28). Further, it is submitted that when the receiver became aware of his utter inability to accomplish anything for anyone, and that a continuance of the receivership would only increase the burdens of the estate, it was incumbent upon him to so advise the court. The failure to do so is, in itself, sufficient ground for denying the receiver any compensation. (Nowell v. International Trust Co., 169 F. 497, 505, cert. den. 217 U.S. 603, 30 S. Ct. 693, 54 L. Ed. 898).

The receiver was also derelict in failing to comply with the direction of the court, in both orders of appointment, that he enter his appearance on behalf of the corporation in any pending litigation. Although such litigation existed, and was most important to the corporation, the receiver failed to appear in any part of it. Among these causes are the following: An action in the Circuit Court of Northumberland County, Virginia, (S. Louise Blundon v. Blundon Investment Corporation et al.); seeking to divest the corporation of its property (despite the fact that the institution of this action was the sole reason for his appointment (App. 5)). A subsequent action in that court, wherein a valuable tract in which the corporation had acquired a purported fee estate was held to be only a life estate (H. Gordon Blundon, Jr. et al. v. Blundon Investment Corporation, et al.) An action by the corporation in the United States District Court for the District of Columbia for an accounting and other relief, which was dismissed for lack of prosecution (Blundon Investment Corporation v. Lloyd R. Turner and Ben Lindas, No. 2021-54).

The entire course of the receivership has been marked by the negligence and irresponsibility of the receiver. He lost jurisdiction of the property of the corporation in Virginia in 1954, by failing to comply with the requirements of the statute. By the time he reacquired jurisdiction in 1956, an additional trust had been placed upon the property, to the detriment of general creditors (App. 28). He recklessly instituted an

unwarranted, and most expensive,proceeding against the appellants, as will be shown in Point III. He was even negligent in filing reports with the court (App. 7, 21).

Despite this sorry record, which appellants set forth in their written opposition to the petition for compensation (App. 35-43), and which they attempted to set forth in their oral argument (App. 52-60), the court declared that it would "assume that the services that have been rendered were reasonably necessary and were within the sound discretion of the receiver" (App. 55), and that it was not necessary for it to go into the details of these services (App. 52, 58). Appellants submit that the findings of the court that the receiver had acted with great diligence and skill (App. 62), and that all the activities of the receiver which had been questioned were necessary and properly rendered (App. 63), were entirely arbitrary, and that the order predicated thereon, awarding the receiver full compensation, should not be permitted to stand.

It may be noted, parenthetically, that,in any event, it was improper to grant the receiver full compensation to date, inasmuch as the receivership has not been terminated. It has often been held that sound public policy requires an intermediate allowance to a receiver to be materially less than the worth of the prior services. The courts have realized the value of an inducement to dispatch by the receiver, and have also been mindful of the possibility that prior to the termination of the receivership, the receiver might forfeit his right to any fees, and might even be surcharged (Maxwell v. Wilmington Dental Mfg. Co., 82 F. 214; Fischer v. Liberty National Bank & Trust Co., 61 F. 2d 757, cert. den. 288 U.S. 611, 53 S. Ct. 403, 77 L. Ed. 985; Phelan v. Middle States Oil Corp., 154 F. 2d 978.).

POINT III

IT WAS ERROR FOR THE COURT TO ALLOW THE RECEIVER COMPENSATION FOR UNWARRANTED AND UNPRODUCTIVE ACTIVITIES.

The receiver should receive no compensation for activities and

expenses in connection with his motion in the United States District Court for the Eastern District of Virginia at Richmond to vacate appellants' judgment upon the note secured by their deed of trust. This utterly unfounded motion, brought without court authorization, was maliciously contrived to harass the appellants, and to create for the receiver a record of activity for which he could seek compensation. In denying it, Judge Bryan, after finding that there was absolutely no basis for the receiver's reckless charge of fraud, observed that the receiver had wholly failed to allege any defect in the judgment, that he had completely failed to plead or prove any defense to the note or deed of trust, and that neither when or since he enjoined sale under the deed of trust had he questioned its validity in any way (App. 44-45).

A receiver can legally do nothing without express authority of the court. Should he conduct unauthorized activities, he can recover neither fees nor expenses. (Darling v. Cornstalk Products Co., 54 F. 2d 670). It is for the court to determine whether an appeal should be taken (Hatton v. Vose, 156 F. 2d 464), or whether any proceedings should be instituted at the expense of the estate (Clark on Receivers, 2nd Ed., sec. 835), and fees for unnecessary and unwarranted litigation are improper (Id., sec. 836).

Yet for this adventure the receiver sought, and was awarded, compensation in an amount exceeding $1,500 -- based on items 18-20, 23, and (b), together with "expenses" and a reasonable proportion of the 50 hours allotted to "miscellaneous phone calls and correspondence", all as set forth in his statement of services (App. 32-35). The sheer inequity of this allowance becomes even more startling when it is recalled that the appellants, who were themselves put to great expense in counsel fees and costs in the matter, and who did prevail, have, in effect, been ordered to reward the receiver for thus harassing them, to the extent of one half of his fee.

The receiver should receive no compensation for the activities and

expenses in connection with his alleged attempts to sell the lands of the corporation. He was appointed a temporary receiver, empowered to conserve the property of the corporation, not to liquidate it. He never reported the corporation to be insolvent. On the contrary, he alleged that the property was worth far more than the trusts with which he was exercised, and that injunctions should issue lest the equity of the corporation therein be lost upon forced sale (App. 11, 16). And the plaintiff in the principal litigation, it may be remembered, is not even a creditor of the corporation.

The order authorizing the sale of the lands of the corporation was itself invalid. It was beyond the scope of the authority conferred upon the receiver in his orders of appointment (App. 6-7, 14-15). Further, since the corporation had no assets other than the lands, the effect of the order to sell was to authorize the receiver to liquidate a foreign corporation, which the court had no power to do. (Marion v. British Type Investors, 94 F. Supp. 755, 756, cited in Barron & Holtzoff, Federal Practice and Procedure, 1957 Supp., sec. 1452). And, still further, it was highly improper for the court to order a sale at a preliminary stage of the suit, where the propriety of the sale depended upon the determination of issues of fact, and thus to put it out of its power to return the property to the corporation, should the corporation prevail. (75 C.J.S., Receivers, sec. 221). The compensation sought, and awarded, for this fruitless activity exceeds $1,000. -- based upon items 16-17, 21-26, and (a), together with "expenses" and a fair share of the 50 hours assigned to "miscellaneous phone calls and correspondence", in the statement of services (App. 32-35).

Nor should the receiver be compensated for activities and expenses in connection with the injunctions he obtained. It has already been shown that they were obtained by misrepresentation, improvidently maintained, and ultimately vacated as futile. Here again the court unjustly piled injury upon injury. Not only have appellants been irreparably damaged by the decline in the value of their security and the loss of interest during

the life of the injunctions, not only have they been put to the great burden and expense of intervening in this litigation to obtain the dissolution of these injunctions, but they have now, in effect, been directed to pay the receiver for securing them.

CONCLUSION

It is respectfully submitted that the orders entered by the court below on December 17, 1957, and December 31, 1957, respectively, awarding compensation to the appellee, and directing that one half of that compensation be paid by the appellants, be reversed.

Respectfully submitted,

LOUIS UROW
MILTON E. CANTER

Pro Se

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APPELLANTS APPENDIX

[Filed Feb. 10, 1954]

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36 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MARY E. SEAMAN HARRIS
8115 Allentown Road, S. E.
Friendly, Maryland
Washington 22, D. C.

Plaintiff

vs.

BLUNDON INVESTMENT CORP.,
A Body Corporate,
c/o Ben Lindas
602 - 7th Street, S. W.
Washington 24, D. C.

Defendant #1

Civil Action No. 543-54

BEN LINDAS
602 - 7th Street, S. W.
Washington 24, D. C.

Defendant #2

S. LOUISE BLUNDON
Burgess, Virginia
(Serve Upon Defendant at Central
Dispensary & Emergency Hospital
17th and New York ave., Washington
6, D. C.)

Defendant #3

T. D. HARRIS, Also known as
Thornley Durant Harris
Dillon, South Carolina

Defendant #4

COMPLAINT FOR INJUNCTION, APPOINTMENT OF RECEIVER, ETC. - CORPORATION

1. Plaintiff is an adult citizen of the United States and a non-resident of the District of Columbia, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00, and also this action is based upon the equity powers of this Honorable Court.

2. Defendant Blundon Investment Corporation, a body corporate, hereinafter referred to as Defendant #1, is a foreign corporation having been incorporated under the laws of the State of Delaware but has its principal office and place of business in the District of Columbia; that the defendant, Ben Lindas, hereinafter referred to as Defendant #2, is an adult citizen of the United States and a resident of the District of Columbia, and is sued individually as a stockholder and also as president of the aforesaid corporation, and the defendant, S. Louise Blundon, hereinafter re-
37 ferred to as Defendant #3, is an adult citizen of the United States and a non-resident of the District of Columbia, and is sued individually and as a stockholder and as Secretary and Treasurer of said corporation; and the said defendant T. D. Harris, also known as Thornley Durant Harris, hereinafter called Defendant #4, is an adult citizen of the United States and presently a non-resident of the District of Columbia residing in Dillon, South Carolina, and is sued individually and as a stockholder of the aforementioned corporation, Defendant #1.

3. The said corporation is the owner and holder of certain parcels of real property, known as 608 - 7th Street, S. W., in the District of Columbia, which is improved by a building, and also certain parcels of unimproved land in Burgess, Virginia; all of these parcels of land are subject to mortgages or deeds of trust, all of which your petitioner is informed are past due and will be foreclosed in a short space of time; that on, to wit, June 12, 1952, the plaintiff purchased Certificate No. 7 for 100 shares of stock in the Blundon Investment Corporation-preferred stock 6%, for the sum of $10, 000. 00; that she and Defendants #2, #3 and #4 are all the stockholders of said corporation and that she was advised to purchase said stock in the corporation as a result of alleged false and fraudulent misrepresentations; that she has been informed and therefore alleges that the corporation at the present time has no money in its treasury and that the deeds of trust on the parcels of real property are now past due and subject to foreclosure; that furthermore your plaintiff has been informed and therefore avers that the officers of the corporation have refused to cooperate with each other and that no business is being

transacted on behalf of said corporation; that the assets of this corporation are definitely in jeopardy and that a receiver should be appointed pendente lite and permanently to take over said assets of the corporation so as to prevent foreclosure and dispersal of any of the valuable assets of said corporation, otherwise irreparable damage will be done to the plaintiff.

WHEREFORE plaintiff prays that a receiver be appointed pendente lite and permanently to take over the assets and affairs of said corporation and attempt to prevent foreclosures of said deeds of trust or mortgages now against said assets or parcels of realty and also to operate

38 said corporation and to liquidate such assets, if same is possible, and that furthermore that said receiver report to the Court on the affairs past, present and future of said corporation and that this Court make a determination as to the portion, up to the sum of $10,000.00 plus interest, that your plaintiff is entitled to from the assets of the corporation and from the individual defendants named both individually and as stockholders and officers of said corporation, and for such other and further relief as to the Court appears proper.

/s/ Mary E. Seaman Harris

* * * * *

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39 [Filed July 21, 1954]

ANSWER OF DEFENDANT, BLUNDON INVESTMENT CORPORATION

First Defense

The complaint fails to state a claim against this defendant, for which relief can be granted by this Court.

Second Defense

The Court has no jurisdiction over this defendant.

Third Defense

The Court has no jurisdiction over the subject matter of the complaint against this defendant.

Fourth Defense

1. Defendant admits that plaintiff is a non-resident of the District of Columbia; has no knowledge of the citizenship of plaintiff; denies the remaining allegations of paragraph No. 1 of the complaint.

2. Defendant admits that it is a Delaware corporation, and that defendant, S. Louise Blundon, is secretary thereof, and a stockholder therein; has no knowledge of the citizenship of the remaining defendants; denies the remaining allegations of paragraph No. 2 of the complaint.

3. Defendant admits that it holds parcels of land in Virginia subject to deed of trust; denies the remaining allegations of paragraph No. 3 of the complaint.

40 Fifth Defense

The alleged certificate of stock referred to in the complaint was never duly issued to plaintiff, and plaintiff is not a stockholder of defendant corporation.

Sixth Defense

The alleged certificate of stock referred to in the complaint is null and void for the absence of consideration.

Seventh Defense

The alleged issuance of the stock referred to in the complaint was ultra vires defendant corporation.

First Counterclaim

Plaintiff is indebted to defendant in the amount of $800 for monies of the defendant wrongfully paid over to the plaintiff by defendant, Ben Lindas.

Second Counterclaim

If the alleged certificate of stock referred to in the complaint was duly issued to plaintiff, plaintiff is indebted to defendant corporation for the full consideration set forth therein, which consideration defendant corporation has never received.

WHEREFORE defendant corporation prays that the complaint be dismissed against it with costs, and that it recover from plaintiff the sum of $800, together with such sum as this Court may determine is

properly due plaintiff on account of the alleged purchase by plaintiff of stock in defendant corporation, besides interest and costs.

CANTER AND UROW
Attorneys for Defendant
Blundon Investment Corporation

* * * * *

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41 [Filed October 12, 1954]

ORDER

Upon consideration of the motion to withdraw as counsel filed herein by Milton E. Canter and Louis Urow, counsel for the defendant, Blundon Investment Corporation, and it appearing to the court that counsel for the plaintiff and the said defendant were notified of the said motion and that they have not opposed the granting of the same, it is, by the court, this 6th day of October, 1954,

ORDERED, that the said Milton E. Canter and Louis Urow by and they hereby are allowed to withdraw as counsel for the defendant, Blundon Investment Corporation, in the above entitled cause.

/s/ Alexander Holtzoff
Judge

* * * * *

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42 [Filed October 12, 1954]

MOTION TO APPOINT TEMPORARY RECEIVER

Comes now Ben Lindas, one of the above named defendants, and moves the Court for an order appointing a temporary Receiver for said Corporation and as reason therefore shows to this Court as follows:

There is now pending in the Circuit Court of Northumberland County, Virginia, a suit to cancel all obligations and stock of said corporation, and to return to S. Louise Blundon all the property of said Corporation; that the said suit will be heard in said Court within two weeks and will constitute a fraud on this Court.

That the Office of said Corporation is the District of Columbia and that the filing of said suit is a subterfuge to evade the jurisdiction of this Court.

That unless a Receiver is immediately appointed, all evidence as to the liability of said Corporation for Mortgages, Notes and outstanding Stock will be destroyed.

That the suit pending in Northumberland is based on perjury, fraud and misrepresentations of the most glaring nature.

/s/ Ben Lindas

Copies of above Motion mailed Oct. 7, 1954
to Canter and Urow, Attorneys, Barr Bldg
and Albert Brick, Attorney, Denrike Bldg

/s/ Ben Lindas

[JURAT, dated Oct. 12, 1954]

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43 [Filed October 12, 1954]

ANSWER

Comes now Ben Lindas, one of the above named defendants, and for answer to the Complaint filed herein, admits the allegations of said Complaint and consents to the Court granting the relief prayed for in said Complaint.

/s/ Ben Lindas

* * * * *

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44 [Filed November 4, 1954]

ORDER APPOINTING TEMPORARY RECEIVER

The motion of Ben Lindas, one of the above named defendants, asking for the appointment of a Temporary Receiver for the Blundon Investment Corporation, above named defendant, coming before me to be heard, and the Court being advised in the premises, it is, by the Court, this 4th day of November, 1954,

ORDERED, that the said motion be and the same is hereby granted, and it is further

ORDERED, that James C. Toomey, a member of the Bar of the District of Columbia, be and he is hereby appointed Temporary Receiver for the said Blundon Investment Corporation, upon giving a surety bond

in the sum of $1000 for the purpose of taking immediate possession of all the books, accounts, records and documents of every kind of the said corporation, and for the further purpose of taking immediate possession of all assets of said corporation and of entering his appearance for the said corporation in any pending litigation for the purpose of protecting the interests of all stockholders and creditors of the said corporation, and it is further ordered that the said Temporary Receiver retain possession of all the said property until further orders of this Court, or until a permanent Receiver has been appointed and qualified.

/s/ Alexander Holtzoff
Judge

Consented to:

Albert Brick
Attorney for Plaintiff

CLERK'S OFFICE

45 [Filed January 31, 1955] [U.S. District Court for the District of Columbia]

James C. Toomey, Esq.
Barr Building, Washington, D. C.

Qualified in Office: November 8, 1954

Report Due: January 8, 1955

MEMORANDUM WITH RESPECT TO DELINQUENT FIDUCIARY

Pursuant to the requirement of Rule 22, it is reported to the Court that the above-named fiduciary has not filed the 60-day Report within the prescribed time.

* * * * *

LET THE NOTICE OF SUMMARY HEARING ISSUE, RETURNABLE February 17, 1955, at 10:00 O'CLOCK A.M.

January 28, 1955

/s/ R. B. Keech
Judge

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51 [Filed July 6, 1955] EXHIBIT

AMENDED ANSWER OF DEFENDANT BEN LINDAS

* * *

55 FOURTEENTH: That in the month of August, 1954, the said Corporation, S. Louise Blundon and Albert Weinstein attempted to repudiate the settlement made in February, 1954, and filed suit in the name of S. Louise Blundon against the Blundon Investment Corporation, T. D. Harris and others, for the purpose of cancelling the Deeds of Trust issued; falsely
56 and fraudulently alleging she knew nothing about any transactions, and aided and abetted by Albert Weinstein and T. D. Harris, filed Criminal Charges against said defendant, Ben Lindas, based on rank and disgraceful perjury; that on June 13, 1955, the said charges were dismissed by the Court, without a hearing.

FIFTEENTH: That the said proceedings filed as aforesaid, was the first step in a continuing vicious attempt at Blackmail; that said defendant has been told that he must either pay $5000.00 in cash; have the $5000.00 Deed of Trust released, or take the consequences; that this attempt of Blackmail has continued since the suit was filed; that the money, if paid, or the trust, if assigned, was to be used to cover fraudulent charges pending against the said T. D. Harris, in the District of Columbia.

* * *

WHEREFORE, premises considered, said defendant, Ben Lindas, prays:

FIRST: That the Receiver be instructed to immediately demand the books, accounts and vouchers be delivered to him, and if not done, he cite the Officers of said Corporation for Contempt of Court.

SECOND: That said defendant, Ben Lindas, have an order restraining and enjoining the Officers of said Corporation from proceeding further with the suit now pending in Northumberland County, Virginia, as same was filed for the sole purpose of depriving this Court of jurisdiction and for blackmail.

THIRD: That defendant, Ben Lindas, have an order directing the said Corporation to return to said defendant the stock surrendered by him

under agreement dated February 23, 1955.

FOURTH: The defendant, Ben Lindas, have a further order declaring the preferred stock of Mary Seaman Harris to be in full force and

57 effect, having been ratified by the Corporation and fully paid for.

FIFTH: That said defendant, Ben Lindas, have a further order directing that said Corporation return the preferred stock of the said Freda Coppedge, as same was secured from her by fraud on the part of officers of the Corporation, and is fully paid and in good standing.

SIXTH: That said defendant, Ben Lindas, have a personal judgment against said Corporation for the sum of $3175.00 with interest from September 15, 1953, being balance due for cash advanced said Corporation.

SEVENTH: That defendant, Ben Lindas, be allowed a reasonable fee for services rendered said Corporation from September 1951 to February 23, 1954.

EIGHTH: For such other and further orders as to the Court may seem just and proper.

/s/ Ben Lindas
In proper person

DISTRICT OF COLUMBIA:SS:

Before me personally appeared Ben Lindas, who being duly sworn, states that the facts set forth in said Amended Answer are true.

/s/ Ben Lindas

[JURAT, dated June 24, 1955]

[Certificate of Mailing]

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64 [Attached to Amended Answer of Defendant Ben Lindas]

February 23, 1953

Blundon Investment Corporation,
Washington, D. C.

Gentlemen:

I hand you herewith my resignation as a member of the Board of Directors of the said Corporation and as President of the said Corporation.

Also I hand you Stock Certificate No. 3 for one share of stock in said Company and Stock Certificate No. 5 for 49 shares of stock. This stock is surrendered for the purpose of cancellation. Also I agree to have a certain deed of trust dated May 1953 for the sum of $3500.00, secured by property known as Independance, canceled and released of record upon the payment of the sum of $325.00 by the said Corporation.

/s/ Ben Lindas

In consideration of the above we hereby accept the said offer, ratify and confirm the actions of the said Ben Lindas, as President of the said Corporation and approve the financial statement heretofore rendered by him.

Blundon Investment Corporation

(signed) By S. Louise Blundon

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66 [Filed August 18, 1955]

MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Comes now James C. Toomey who qualified as temporary receiver in the above captioned cause on November 8, 1954, and asks this Honorable Court for a temporary restraining order, preliminary injunction and permanent injunction against John James Bernard, sole surviving trustee, restraining the said John James Bernard from proceeding with a public auction currently to be held in Heathsville, Virginia, on Saturday, August 20, 1955, at 10:00 o'clock A. M., of two certain tracts of land in Fairfields Magisterial District, known as "Burgess Farm" and "Old Church Tract". The reason for this request at this time is that this temporary receiver has been only recently notified of the appearance of an advertisement in the Northumberland Echo, a weekly paper published in Heathsville, Virginia, which advertisement is attached hereto, marked "Exhibit A" and made a part hereof. The property in question is the property over which the pending litigation is concerned.

67 * * * * *

It is the understanding of this temporary receiver that this property is worth approximately One Hundred Thousand ($100, 000. 00) Dollars, and further, that the said deed of trust note under which the property is attempted to be auctioned is in the amount of Fifteen Thousand ($15, 000. 00) Dollars. It is the further understanding of this temporary receiver that in the amended answer filed herein by defendant, Ben Lindas, on July 27, 1955, there is included a prayer asking that a pemanent receiver should be appointed. Upon the appointment of such permanent receiver, and the qualification of said receiver, said receiver would be entitled under Title 28, Section 754, United States Code, to take possession of such property and hold the same pending the final determination by this court of the above captioned cause. In the event the property is sold on the advertised date at public auction an immediate irreparable loss will be suffered by parties to this litigation.

* * * * *

68 /s/ James C. Toomey
James C. Toomey

* * * *

* * * * *

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70 [Filed August 18, 1955]

TEMPORARY RESTRAINING ORDER

* * * * *

71 ADJUDGED and ORDERED: That John James Bernard, sole surviving trustee, under the deed of trust, dated March 29, 1954, recorded in Deed Book 99, page 191, in the Clerk's office of the Circuit Court of Northumberland County, Virginia, his agents, servants or employees of every kind be, and they are hereby restrained and enjoined until further order ~~to be entered herein after hearing before this Court holding motions court on the day of August, 1955, at 10:00 o'clock A. M., from selling at~~ from selling at public auction, or otherwise, the real estate described in said deed of trust known as "Burgess Farm" and "Old Church Tract"; provided and

injunctive undertaking in the sum of $250 be given and approved.

This Order expires on August 29/1955 at 4 P.M.
The motion for a preliminary injunction is hereby set for argument in Motions Court for August 29, 1955. /s/ Alexander Holtzoff
JUDGE

* * * * *

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72 Clerk's Notation from Face of Jacket

(Designated as Minute Entry-Item 14)

Aug 29 1955 Motion for preliminary injunction argued; leave granted to withdraw said motion.

McGarraghy, J.

* * *

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73 [Filed August 30, 1955]

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BEN LINDAS, AGAINST THE BLUNDON INVESTMENT CORPORATION, DEFENDANT

Comes now the defendant, Ben Lindas, and moves for Summary Judgment against the defendant, the Blundon Investment Corporation, as follows:

1. That said defendant, Ben Lindas, have a Judgment providing for the appointment of a permanent Receiver, with instructions to demand possession of all books and accounts of said Corporation, that said permanent Receiver file immediately a copy of his appointment in the United States District Court at Richmond, Virginia, and take control of the assets of said Corporation in Northumberland County, Virginia.
2. That said Judgment provide that the Blundon Investment Corporation deliver to the said defendant, Ben Lindas, the shares of stock surrendered by him, and that the said Ben Lindas be reinstated as a stockholder in said Corporation.
3. That the said Judgment provide that the preferred stock issued to Mary Seaman Harris is in full force and effect and fully paid.
4. That said Judgment provide that the said Corporation shall deliver to Freda Coppedge the shares of preferred stocks formerly held by her, as same was secured by misrepresentation and fraud.

5. That said Judgment provide for the payment to said Ben Lindas, of the sum of $3175, being balance due from said Corporation for money advanced.

* * * * *

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77 [Filed September 19, 1955]

[Attached to Objections to Motion To Strike Pleadings, filed by defendant Lindas on September 19, 1955]

* * * February 23, 1954

Blundon Investment Corporation,
Washington, D. C.

Gentlemen:

I hand you herewith my resignation as a member of the Board of Directors of the said Corporation and as President of the said Corporation. Also I hand you stock Certificate No. 3 for one share of stock in said Company and Stock Certificate No. 5 for 49 shares of stock. This stock is surrendered for the purpose of cancelation. Also I agree to have a certain deed of trust dated May 1953 for the sum of $3500.00, secured by property known as Independance, canceled and released of record upon the payment of the sum of $325.00 by the said Corporation.

/s/ Ben Lindas

In consideration of the above we hereby accept the said offer, ratify and confirm the actions of the said Ben Lindas, as President of the said Corporation and approve the financial statement heretofore rendered by him.

Blundon Investment Corporation
By /s/ S. Louise Blundon

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87 [Filed Jan. 7, 1956]

AMENDED ANSWER OF BEN LINDAS

* * * * *

88 * * * * this defendant resigned as President of said Corporation, also as a Director on, to wit, February 23, 1954 and which resignation was accepted by the Blundon Investment Corporation signed by S. Louise Blundon.

* * * *

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90 [Filed January 16, 1956]

ORDER

Upon consideration of the oral motion of attorney for the defendant, Ben Lindas, individually, and as President of Blundon Investment Corporation, for the revocation of the appointment of James C. Toomey as temporary receiver for the Blundon Investment Corporation, above named defendant, made in open Court, and upon further consideration of the argument of counsel for all parties, it is, by the Court, this 16th day of January, 1956,

ORDERED, that the appointment of James C. Toomey as temporary receiver for the Blundon Investment Corporation, be and the same is hereby revoked, and upon the filing and the approval of the final account of the temporary receiver, the temporary receiver and his surety be and they are hereby relieved of any further duties in this cause and are fully discharged.

/s/ Alexander Holtzoff
JUDGE

I HEREBY CERTIFY that copy of the foregoing Order was mailed, postage prepaid, this 13th day of January, 1956, to

Albert Brick, Esquire
Attorney for Plaintiff
517 Denrike Building
Washington 5, D. C.

P. Bateman Ennis, Esquire
Attorney for Ben Lindas
640 Shoreham Building
Washington 5, D. C.

Thomas J. Pearson, Esquire
Attorney for Blundon
Investment Corporation
1511 Investment Building
Washington, D. C.

S. Louise Blundon, Defendant
Burgess, Virginia

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91 [Filed January 16, 1956]

ORDER

Upon consideration of the oral motion of attorney for the defendant, Ben Lindas, individually, and as President of Blundon Investment Corporation, for the appointment of a temporary receiver for the said Blundon Investment Corporation, above named defendant, made in open Court, and the Court being advised in the premises, it is, by the Court, this 16th day of January, 1956,

ORDERED, that the motion for the appointment of a temporary receiver for the Blundon Investment Corporation, be and the same is hereby granted, and it is

FURTHER ORDERED, that James C. Toomey, a member of the Bar of the District of Columbia, be and he is hereby appointed temporary receiver for the said Blundon Investment Corporation, upon giving a surety bond in the sum of $1000 for the purpose of taking immediate possession of all the books, accounts, records and documents of every kind of the said corporation, and for the further purpose of taking immediate possession of all assets of said corporation, and of entering his appearance for the said corporation in any pending litigation for the purpose of protecting the in-
92 terests of all stockholders and creditors of the said corporation, and it is

FURTHER ORDERED, that the said temporary receiver retain possession of all the said property until further order of this Court, or until a permanent receiver has been appointed and qualified.

/s/ Alexander Holtzoff
JUDGE

I HEREBY CERTIFY that copy of the foregoing Order was mailed, postage prepaid, this 12th day of January, 1956, to

Albert Brick, Esquire
Attorney for Plaintiff
517 Denrike Building
Washington 5, D. C.

P. Bateman Ennis, Esquire
Attorney for Ben Lindas
640 Shoreham Building
Washington 5, D. C.

Thomas J. Pearson, Esquire
Attorney for Blundon Investment Corp.
1511 Investment Building
Washington 5, D. C.

S. Louise Blundon, Defendant
Burgess, Virginia

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97 [Filed October 12, 1956]

MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Comes now James C. Toomey who qualified as temporary receiver in the above captioned cause on the 17th day of January, 1956, and asks this Honorable Court for a temporary restraining order, preliminary injunction and permanent injunction against Lloyd E. Turner and Vincent W. Bradley, trustees, restraining the said Lloyd E. Turner and Vincent W. Bradley from proceeding with a public auction currently to be held in Heathsville, Virginia, on Tuesday, October 16, 1956, of a certain tract

of land in Fairfields Magisterial District of Northumberland County, Virginia, known as "Burgess Farm", and for a temporary restraining order, preliminary injunction and permanent injunction against John James Bernard, sole surviving trustee, restraining the said John James Bernard from proceeding with a public auction to be held in Heathsville, Virginia, on Saturday, November 3, 1956, of a certain tract of land in Fairfields Magisterial District of Northumberland County, Virginia, known as "Old Church Tract". The reason for this request at this time is that this temporary receiver has recently received an offer of purchase in the amount

98 of Twenty Thousand($20,000.00) Dollars. With regard to both tracts of land, "Burgess Farm Tract" and "Old Church Tract", on the 11th day of October, 1956, the said tracts of land were transferred by Deed from Ben Lindas, trustee, to James C. Toomey, Temporary Receiver.

* * * * *

It is the understanding of this temporary receiver that this property is worth about One Hundred Thousand ($100,000.00) Dollars, and further, that the Deeds of Trust Notes, under which the property is attempted to be auctioned, are in the amount of Five Thousand ($5,000.00) Dollars secured by the real property known as "Burgess Farm Tract", and Fifteen Thousand ($15,000.00) Dollars secured by the real property known as "Old Church Tract". This temporary receiver has only recently, October 11, 1956, received a Deed to the above referred to property. In the event the property is sold on the advertised dates at public auction, an immediate irreparable loss will be suffered by parties to this litigation.

* * * * *

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101 TEMPORARY RESTRAINING ORDER [Filed Oct. 12, 1956]

* * * * *

102 ADJUDGED and ORDERED, that John James Bernard, sole surviving trustee under the Deed of Trust dated the 29th day of March, 1954, recorded in Deed Book 99, page 191, in the Clerk's Office of the Circuit Court of Northumberland County, Virginia, his agents, servants or

employees of every kind be, and they are hereby restrained and enjoined until further order to be entered herein after hearing before this Court holding motions court on the 22nd day of October, 1956, at 10:00 A. M. from selling at public auction, or otherwise, the real estate described in said Deed of Trust known as "Old Church Tract", provided an injunctive undertaking in the sum of $250.00 be given and approved.

103 /s/ James W. Morris
JUDGE

* * * * *

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104 [Filed October 20, 1956]

OPPOSITION OF JOHN JAMES BERNARD, TRUSTEE, TO MOTION FOR RESTRAINING ORDER, ETC.

1. The trust referred to in the restraining order was executed and delivered on March 29, 1954, prior to the appointment of a receiver herein, to secure a note of that date in the face amount of $15,000 for legal services, including, inter alia, the recovery of assets in excess of $75,000. Suit was filed upon this note in the District Court of the United States for the Eastern District of Virginia at Richmond, styled Milton E. Canter and Louis Urow v. Blundon Investment Corporation and S. Louise Blundon, Civil Action No. 2250, and judgment was obtained on October 3, 1956, against the defendants, jointly and severally, in the sum of $15,000, with interest at six per centum from March 29, 1954 until paid, and costs, and against the corporate defendant in the additional sum of $1,500, with interest at the rate of six per centum until paid. The defendants also entered into a stipulation in open court, referred to in the judgment, that they would make no attempts to prohibit or enjoin the sale of the property under the deed of trust. A certified copy of said judgment and photostatic copy of said stipulation will be submitted at the hearing upon this motion. The right of the noteholders to full recovery under the note is thus res adjudicata, and the receiver, standing in the shoes of the corporation, is debarred from attempting to prevent the noteholders from proceeding under the terms of the trust.

2. The receiver has no jurisdiction over the property described in the restraining order, inasmuch as he is not qualified to serve as receiver in the state of Virginia, where the property is located. The re-
105 ceiver was appointed on November 4, 1954, and ordered to take possession of all assets, and to enter his appearance in any pending litigation. Under U. S. C., Title 28, Section 754, he thereupon became vested with jurisdiction of the property of the corporation in Virginia, and obtained capacity to sue and be sued therein, provided that, within ten days, he filed copies of the complaint and his order of appointment herein, in the United States District Court for the Eastern District of Virginia, the district where the property was located. No such documents were filed within the statutory period. There will be submitted at the hearing upon this motion a certification by the clerk of said court that on August 25, 1955, more than nine months later, no such documents had been filed. If any such papers were filed subsequently, and the receiver does not allege that they were, such filing could not operate to give him jurisdiction of the property. Although the record in this case, prior to the appointment of the receiver, apprised him of the existence of the real estate owned by the corporation in Virginia, and of pending litigation in relation thereto, the receiver neither took jurisdiction of the property, nor intervened in the litigation, despite the directions in the appointing order.

3. Even if the receiver in some manner acquired jurisdiction of the Virginia property, he obtained no greater rights in respect thereto than had the corporation, inasmuch as this trust was in existence when the receiver was appointed. "A receiver possesses no rights with respect to the trust property superior to those which would be possessed by the one for whom he was appointed, were the latter acting for himself. Furthermore, the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens." 45 Am. Jur., Receivers, sec. 156, p. 130. The rights and obligations of defendant corporation have been fully adjudicated, as has been shown in Paragraph 1, supra.

4. The instant motion was brought pursuant to a conspiracy to

thwart the noteholders in their efforts to recover sums owing by the corporation, to harass them, and to cause them great expense and inconvenience. The conspiracy has succeeded in so doing for more than two

106 years. This is the fourth restraining order obtained by the parties thereto, and the second one obtained by this receiver. The first restraining order was obtained in an action against the noteholders in a Virginia state court; the action was removed to the federal court at Richmond, and dismissed. The second, issued by the same state court, expired of its own limitation, as did the third, obtained by this receiver in this court. The fact that the hearing of this motion, ten days after issuance of the fourth restraining order, will precede by two weeks the sale advertised by this trustee, exemplifies this policy of harassment. The representation of the receiver to this court that there was no opportunity for a hearing in advance of the restraining order sought and obtained by him was manifestly unwarranted.

5. Neither this trustee nor the noteholders are parties to this litigation, nor have they any interest therein.

6. The receivership is void, inasmuch as no notice of the motion therefor was served upon defendant corporation, and the corporation did not consent thereto.

Canter and Urow
Barr Building
Attorneys for John James
Bernard, Sole Surviving
Trustee
/s/ Louis Urow

[Certificate of Service]

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107 [Filed October 25, 1956]

PRELIMINARY INJUNCTION

This cause came on to be heard upon the motion of the receiver, James C. Toomey, for a preliminary injunction and other relief, and after argument by counsel for both sides in open Court, and it appearing to the satisfaction of the Court that pending further order of this Court, the issuance of a temporary injunction is necessary to prevent immediate and continuing irreparable injury and loss of assets of the corpus of

the estate held by said receiver, and that said receiver is in danger of suffering substantial loss of said assets unless the trustees on two (2) mortgages are prevented from selling under foreclosure sale, it is, by the Court, this 25th day of October, 1956,

ADJUDGED and ORDERED, that until further order of the Court and pending final hearing of this cause, Lloyd E. Turner and Vincent W. Bradley, trustees under the First Deed of Trust against property known as a certain tract of land in Fairfields Magisterial District of Northumberland County, Virginia, known as "Burgess Farm", are restrained and enjoined from proceeding with any sale at public auction of the aforesaid property; and it is further

ADJUDGED and ORDERED, that until further order of the Court and pending final hearing on this cause, John J. Bernard, the sole sur-
108 viving trustee under a Second Deed of Trust on property known as a certain tract of land in Fairfields Magisterial District of Northumberland County, Virginia, known as "Old Church Tract", is restrained and enjoined from proceeding with any sale at public auction of the aforesaid property.

Provided, that the receiver, James C. Toomey, shall proceed as receiver to bring about the sale of said properties under Court Order as expeditiously as possible, and further, provided that upon the sale of either or both of said properties, the receiver shall notify this Court of the amount of cash received and request authorization of said Court for an increase in bond to cover the amount of cash received.

* * /s/ Burnita Shelton Matthews, JUDGE

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115 [Filed January 22, 1957]

ORDER GRANTING LEAVE TO RECEIVER TO ENTER INTO CONTRACT

Upon consideration of the petition of Receiver for leave to enter into a contract for the sale of real property known as a certain tract of land in Fairfield Magisterial District of Northumberland County, Virginia, Burgess Farm, the contract calling for the sale of said property for the

price of Twenty-Nine Thousand Six Hundred ($29, 600. 00) Dollars, and the two appraisals on said property, it is, by the Court, this 22nd day of January, 1957,

ORDERED, that James C. Toomey, Receiver for the Blundon Investment Corporation, is hereby granted leave to enter into a Contract of sale for said property according to the terms as stated in the copy of said contract attached to the petition.

/s/ Alexander Holtzoff
JUDGE

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116 [Filed February 28, 1957]

James C. Toomey (fiduciary)
Barr Building
Washington, D. C.

Qualified in Office: January 17, 1956

Report Due: February 17, 1957

MEMORANDUM WITH RESPECT TO DELINQUENT FIDUCIARY

Pursuant to the requirement of Rule 22, it is reported to the Court that the above-named fiduciary has not filed the Annual Report and Account within the prescribed time.

* * *

LET THE NOTICE OF SUMMARY HEARING ISSUE, RETURNABLE March 20, 1957, at 10:00 O' CLOCK A. M.

February 27, 1957 /s/ Matthew F. McGuire
JUDGE

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124 [Filed August 23, 1957]

MOTION FOR LEAVE TO INTERVENE

Milton E. Canter and Louis Urow move the Court for leave to intervene in this action, under Rule 24 of the Federal Rules of Civil Procedure, in order to assert the matters and to seek the relief described in their proposed MOTION TO DISSOLVE PRELIMINARY INJUNCTION, ETC.,

a copy of which is hereto attached, upon the grounds that they are so situated as to be adversely affected by the conduct or inaction of the temporary receiver herein with respect to property in his custody, that their interest is not represented by any of the parties herein, and that they may be adversely affected by a continuance of an injunction and of the temporary receivership herein.

* * *

126 MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND/OR TO VACATE TEMPORARY RECEIVERSHIP, OR TO MODIFY UNDERTAKING OF TEMPORARY RECEIVER

Now comes Milton E. Canter and Louis Urow, beneficiaries of a deed of trust given by defendant corporation upon two tracts of land in Northumberland County, Virginia, and known as "Old Church Tract" and "Burgess Farm", respectively, and move the Court (1) to dissolve the preliminary injunction herein, specifically restraining the trustee under said deed from selling "Old Church Tract", and impliedly restraining said trustee from selling "Burgess Farm" thereunder, and (2) to vacate the temporary receivership of defendant corporation, or, in the alternative, (3) to modify the undertaking of the temporary receiver to provide that he shall forthwith post a bond in the principal amount of $25,000, with sureties approved by the Court, to secure intervenors against any loss or damage arising from the failure of the temporary receiver to pay their judgment against the corporation upon the note secured by said deed of trust, and all costs and fees specifi ed in said deed, by a day certain to be fixed by this Court, and as grounds therefor, state as follows:

1. The preliminary injunction herein also restrains sale of the aforementioned "Burgess Farm" under a first deed of trust for the benefit of one Lloyd R. Turner, thereon; wherefore, intervenors, as beneficial holders of the second trust thereon, consider themselves to be equally restrained from selling said tract. (The temporary receiver has previously caused intervenors' trustee to be restrained, upon his ex parte motion, from selling either "Burgess Farm" or "Old Church Tract".
127 Said trustee has similarly been restrained upon two occasions in the courts of the State of Virginia, in actions which were subsequently dismissed.)

2. The instant cause involves an internal management dispute between an alleged stockholder and a foreign corporation. Neither intervenors nor their trustees have any interest therein, nor did any of them receive notice of the motion upon which the temporary receiver herein was appointed, nor did they consent to said appointment.

3. Intervenors' deed was given by the corporation on March 29, 1954, to secure a note maturing on September 29, 1954. Judgment on said note against the corporation has been obtained by intervenors in the District Court of the United States for the Eastern District of Virginia at Richmond, in an action styled Milton E. Canter and Louis Urow v. Blundon Investment Corporation and S. Louise Blundon, Civil Action No. 2250, in the amount of $15,000, with interest at six per centum from March 29, 1954, and $1500, with interest at six per centum from October 3, 1956, and costs; wherefore said corporation is now indebted to intervenors in an adjudicated amount of approximately $20,000, exclusive of trustee's fees and additional costs payable under the provisions of said deed.

4. The affidavit of the holder of the first trust upon "Burgess Farm", herein states that the amount due under said trust is approximately $9,000. Intervenors are informed and believe that there is a third trust upon said property,wherein one Margaret Zeman is beneficiary, on which there is also due the sum of approximately $9,000, and that, in addition, there are judgment liens upon said property aggregating approximately $3,000. It thus appears that the aforementioned property of defendant corporation is subject to encumbrances in excess of $41,000. It further appears from the reports of the temporary receiver that the corporation has no other assets, that none of the described encumbrances are being challenged by him, and that his right and title to the property is subject to these encumbrances.

128 5. On January 17, 1957, the temporary receiver advised this Court he had secured two appraisals of "Burgess Farm", for $25,000 and $18,315, respectively, and that he had received a sales contract for the purchase of said tract for the sum of $29,600, which he deemed an excellent offer, and asked permission to accept. No appraisals of "Old

Church Tract", or contracts for its sale, have been submitted to this Court by the temporary receiver. Intervenors are informed and believe that its value does not exceed $5,000. It thus appears that the temporary receiver, who, on October 25, 1956, was directed by this Court to sell "Old Church Tract" and "Burgess Farm" as expeditiously as possible, has done nothing to effect a sale of the former tract, which intervenors' trustee is enjoined from selling, and, further, that said receiver cannot sell both tracts for an aggregate amount sufficient to meet the existing encumbrances thereon. It further appears that the temporary receiver could in no wise be injured by a foreclosure by intervenors' trustee, since he has failed to adduce any contracts for the sale of said tracts which will result in a surplus for general creditors, whereas a surplus might result from the sale of these tracts at public auction. Wherefore, the preliminary injunction serves no useful purpose, and should therefore be dissolved.

6. On January 22, 1957, this Court granted the temporary receiver permission to accept a tendered contract for the purchase of "Burgess Farm" for $29,600, but said receiver has yet to consummate said contract, despite the admonition of this Court eight months ago to sell the property expeditiously. Wherefore, the preliminary injunction has not enabled the temporary receiver to acquire any cash whatsoever for the payment of the debts of the corporation; and said injunction should be dissolved to permit intervenors to look to the security upon which they relied in contracting with defendant corporation.

7. The receivership should be vacated for the following reasons:

(a) The receivership is invalid, since it appears from the record that defendant corporation received no notice of the respective motions
129 of defendant Ben Lindas upon which the receiver was appointed, on November 4, 1956, and discharged, and reappointed on January 16, 1956.

(b) The motions upon which the appointments of the receiver have been predicated were not brought by a creditor or stockholder of the corporation, nor do they allege that the corporation is insolvent.

(c) The grounds for the appointment of a receiver specified by defendant Ben Lindas in his motion no longer obtain, since the pending suit against defendant corporation in the Circuit Court of Northumberland County, Virginia, upon which the motion was granted, has been dismissed. Intervenors are informed and believe that defendant corporation thereupon purported to convey its property to defendant Ben Lindas, and that defendant Ben Lindas thereupon purported to convey said property to the temporary receiver herein.

(d) The receivership serves no useful purpose. The corporation is domiciled in Delaware, and domesticated in Virginia. It has no office, does no business, owns no property, and has no assets in the District of Columbia. The instant suit was filed more than three years ago, and still is not at issue. In the course of the receivership, which has now existed for almost three years, the receiver had accomplished nothing for the benefit of the plaintiff herein, or for any creditors or stockholders of the corporation. He can accomplish nothing for the benefit of such persons if the receivership is permitted to continue. Should the corporation be required to bear the costs of the receivership, its continuation will serve only to reduce the amounts recoverable by creditors and stockholders, none of whom, save the plaintiff, sought its creation. And intervenors are informed and believe that no taxes on the property have been paid by the temporary receiver or the corporation, whereby said property has been rendered subject to sale for taxes.

8. If the preliminary injunction herein is to remain in effect, the possibility of irreparable damage to the intervenors requires that a continuation of the injunction be made contingent upon the posting of an undertaking by the receiver in the principal sum of $25,000, conditioned upon the payment to intervenors, by a date certain to be fixed by this
130 Court, of their claims against the corporation, according to the terms of their judgment and deed of trust, to the extent that said claims have not theretofore been satisfied.

* * *

[Verification]

/s/ Louis Urow
Intervenor

132 MOTION FOR IMMEDIATE SEQUESTRATION
OF CERTAIN REAL PROPERTY [Filed Sep. 5, 1957]

* * * *

* * * On or about April 12, 1957, this receiver did receive from the Lawyers Title Insurance Corporation, Richmond, Virginia, an Interim Title Insurance Binder, copy of which is attached hereto and made a part hereof. The said title company in Schedule B provided, among other things, the following: That they would insure title upon the

133 execution of a deed from "Ben Lindas, as Trustee under agreement of record in Deed Book 104, page 163, and under deed from Mortgage Corporation of Virginia of record in Deed Book 104, page 311; S. Louise Blundon and husband, if married, Mortgage Corporation of Virginia; Blundon Investment Corporation, and James C. Toomey, as receiver in Civil Action 543-54." Said deed was to run from the aforenamed parties to the purchasers named above in the sales contract, vesting fee simple title in said parties.

Following receipt of the attached Interim Title Insurance Binder, your receiver, by appointment, conferred with Marvin C. Bowling, Jr., Esquire, Assistant Title Officer, Lawyers Title Insurance Corporation at Richmond, Virginia. As a result of this conference various elements contained in the Interim Title Insurance Binder were straightened out and the said Assistant Title Officer insisted upon the deed referred to above.

* * * *

134 * * * On or about July 1, 1957 your receiver was notified by the Washington, D. C. attorney that Miss Blundon refused to execute the deed. Without such execution the Lawyers Title Insurance Corporation, Richmond, Virginia, refuses to pass title on said deed.

WHEREFORE, your receiver moves this Honorable Court to compel S. Louise Blundon to execute said deed and to order an immediate sequestration of the real property known as "Burgess Store Farm" lying in Fairfields Magisterial District of Northumberland County, Virginia.

/s/ James C. Toomey
Receiver

[JURAT, dated Sept. 5, 1957]

* * * * *

136 LAWYERS TITLE INSURANCE CORPORATION
[Filed Sept. 5, 1957] RICHMOND, VIRGINIA

INTERIM TITLE INSURANCE BINDER

* * * *

137 SCHEDULE B

SECTION 1. Showing requirements to be complied with; defects and objections to be removed or eliminated; and liens and encumbrances to be satisfied and discharged of record before policy of title insurance will be issued without exception thereto.

* * * *

138 Item 3. Satisfaction and release of record of the following judgments as liens on the property herein described:

(a) Bank of Westmoreland, Callao, Virginia, v. S. Louise Blundon, docketed June 16, 1954, in J. D. B. 3,page 165, for $1000. 00 with interest at 6% from April 18, 1954, attorney's fees and costs.

(b) Chesapeake Banking Corporation, Lively, Virginia v. S. Louise Blundon, docketed November 9, 1954, in J. D. B. 3, page 192, for $1000. 00 with interest from November 9, 1954, attorney's fees and costs.

(c) Charles B. Murray v. S. Louise Blundon, docketed August 29, 1955, in J. D. B. 3, page 216, for $500. 00 with interest from May 29, 1954 and costs.

NOTE: With reference to this requirement see NOTE 3 to Item 1(a) above.

Item 4. Dismissal with prejudice after payment of all costs and without entry of decree adverse to the title to the property of Chancery Suit now pending in the Circuit Court of Northumberland County, Virginia, under the style of S. Louise Blundon v. Blundon Investment Corporation, et als. In this suit Miss Blundon sought to have set aside her deed to Blundon Investment Corporation or that she be declared the owner of all the corporate stock. Order entered November 7, 1955, extended to August 1, 1956, a temporary injunction against sale of the property here involved and continued generally the hearing on the merits originally set for

November 14, 1955. No further action appears.

* * * *

Item 6. Dismissal with prejudice after payment of all costs and entry of order setting aside judgment of September 15, 1956, of C. A. 2250 under the style of Milton E. Cantor et al, v. Blundon Investment Corporation et al, now pending in the U. S. District Court for the Eastern District of Virginia at Alexandria.

Item 7. Dismissal with prejudice after payment of all costs of C. A. 2292 under the style of Mary Seaman Harris v. Blundon Investment Corporation et al, now pending in the U. S. District Court for the Eastern District of Virginia at Alexandria.

Item 8. Cancellation and release of record of Trust Deed dated September 28, 1951, recorded October 6, 1951, Deed Book 98, page 9, Blundon Investment Corporation to Vincent W. Bladley and Lloyd Turner, Trustees, to secure Anna Howard $5000.00 note, dated September 28, 1951, interest at 5%.

139 Item 9. Cancellation and release of record of Trust Deed, dated March 29, 1954, recorded March 31, 1954, Deed Book 99, page 191, Blundon Investment Corporation to Ralph A. Cusik and John James Bernard, Trustees, to secure Urow & Cantor note for $15,000.00, dated March 29, 1954, interest at 6%.

Item 10. Cancellation and release of record of Trust Deed, dated April 12, 1955, recorded May 13, 1955, Deed Book 101, page 566, Blundon Investment Corporation to Bee Donnelly and Frank Crowe, to secure note to Margaret Zeman Harris for $6000.00, interest at 6%.

Item 11. Payment of taxes for the year 1956, plus any penalties and interest which may accrue.

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142 [Filed September 6, 1957]

ORDER

Upon consideration of the motion of Milton E. Canter and Louis Urow for leave to intervene in the above entitled cause, and no objection having been entered thereto, it is this 6th day of September, 1957,

ORDERED, that Milton E. Canter and Louis Urow be, and they hereby are, granted leave to intervene in this cause, and are hereby made parties to this cause, and are authorized to file instanter the motion attached to their motion for leave to intervene.

/s/ Alexander Holtzoff
Judge

* * * *

---

144 [Filed September 11, 1957]

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF TEMPORARY RECEIVER FOR IMMEDIATE SEQUESTRATION OF CERTAIN REAL PROPERTY

In opposition to the motion of the temporary receiver for an order sequestering a certain tract of land in Northumberland County, Virginia, known as "Burgess Store Farm", and compelling defendant S. Louise Blundon to join in the execution of a deed conveying said tract to one Frank J. Kilduff and others, the intervenors herein, by their attorneys, submit the following points and authorities:

1. The sequestration prayed would not facilitate the determination of this cause or the duties of the temporary receiver herein, since it would confer no greater rights in the tract upon the temporary receiver than already reside in him by virtue of his appointment and of the conveyance of said property to him by defendant Ben Lindas, trustee.

The record herein.

2. The sequestration prayed cannot be granted by this court, since sequestration is an in rem proceeding, and the property is located in Virginia.

47 Am. Jur., Sequestration, p. 696.

3. The issuance of an order, as prayed, directing defendant S. Louise Blundon to join in a deed of conveyance, whereby there would be

145 satisfied one of the conditions precedent to the approval of title by Lawyers Title Insurance Corporation of Richmond, Virginia, would not enable him to consummate said conveyance, since the temporary receiver

has failed to allege or manifest an ability to satisfy the remaining conditions precedent imposed by said title company.

Interim Title Insurance Binder, attached to instant motion of temporary receiver.

4. Even if the temporary receiver could accomplish a conveyance satisfactory to the aforementioned title company, he would achieve nothing for the benefit of the plaintiff, an unsecured claimant, since the aggregate of duly recorded judgment liens and trusts upon said tract exceed the contract price for its sale, and the temporary receiver has failed to allege or manifest an ability to reduce these encumbrances sufficiently to achieve a balance for the benefit of the plaintiff, should she prevail in this cause.

Interim Title Insurance Binder, ubi supra
Intervenors' Motion to Dissolve Preliminary Injunction, Etc., herein, paragraphs 4 and 5

WHEREFORE, it is respectfully submitted that the temporary receiver's motion should be denied, and that the intervenors should be granted the relief prayed in their pending Motion to Dissolve Preliminary Injunction, Etc., herein.

Canter and Urow
Barr Building
Washington 6, D. C.

Attorneys for Intervenors

/s/ Louis Urow

* * * * *

ORDER DISSOLVING INJUNCTION RESTRAINING INTERVENORS FROM SALE UNDER DEED OF TRUST

This cause came on for hearing on the 1st day of October, 1957, on motion of the intervenors, Milton E. Canter and Louis Urow, to dissolve the preliminary injunction entered herein on the 22nd day of October, 1956, enjoining public sale of two tracts of land, located in Fairfields Magisterial District, Northumberland County, Virginia, and known as "Old Church Tract" and "Burgess Farm", respectively, under the deed of trust given by defendant Blundon Investment Corporation to the intervenors; to vacate the temporary receivership herein; or, alternatively, to require the temporary receiver to give adequate security for the payment of costs and damages to the intervenors consequent upon the issuance of the injunction.

* * * * *

ORDERED and DECREED that the injunction entered herein on the 22nd day of October, 1956, enjoining public sale of certain tracts of land conveyed to the intervenors herein by deed of trust executed by defendant Blundon Investment Corporation, be and the same is hereby dissolved, on condition:

(1) That written notice of any public sale of said tracts be served on all parties to this cause, personally or by registered mail, within a reasonable time prior to the date set for such sale, and

(2) That James C. Toomey, Esq., be compensated out of the proceeds of any such sale for his services as temporary receiver herein, in a reasonable amount to be determined by this court, after the filing of a statement of services, and after hearing, and it is further

ORDERED and DECREED that the respective motions to vacate the temporary receivership or to require the temporary receiver to give adequate security, be and the same are hereby denied.

/s/ Alexander Holtzoff
Judge

148 [Filed November 22, 1957]

PETITION FOR COMPENSATION

Comes now James C. Toomey, Esquire, receiver appointed by the Court in the above captioned cause, and petitions the Court for compensation and for payment of expenses incurred, pursuant to the order of this Court signed October 17, 1957. The said receiver refers the Court to the Statement of Services Rendered, expenses incurred and Court costs, which are affixed hereto and made a part hereof. The petitioner believes that a fair and reasonable amount for services rendered per hour would be Fifteen ($15.00) Dollars.

WHEREFORE, the petitioner prays that this Honorable Court order that the said petitioner be compensated for his services in the following amounts: Services rendered in the amount of Three Thousand Fifteen ($3,015.00), plus expenses incurred in the amount of One Hundred Ninety-Two and Seventy-Nine Cents ($192.79), plus Court costs in the amount of Twenty-One Dollars and Fifty-Five Cents ($21.55).

/s/ James C. Toomey

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150 [Filed November 22, 1957]

STATEMENT OF SERVICES RENDERED

This was an action for money damages and seeking an injunction and the appointment of a reciever. On November 4, 1954, an order was signed by this Court appointing James C. Toomey as temporary receiver. The following is a list of services rendered:

		Hours
1.	November 8, 1954, to Court House, qualified and secured bond	1-1/2
2.	November 22, 1954, conference at Office of Al Brick, Esquire, Attorney for plaintiff	2
3.	November 30, 1954, conference at office of Milton Canter	1
4.	December 21, 1954, conference at office of Milton Canter	1/2

		Hours
	5. February 10, 1955, prepared and filed sixty-day report under Rule 22	1
	6. August 18, 1955, prepared and filed motion for temporary restraining order, preliminary injunction and permanent injunction	3
	7. August 18, 1955, secured temporary restraining order	1
	8. December 6, 1955, prepared and filed Annual Report under Rule 22	1
151	9. January 16, 1956, appeared at Court hearing; appointed temporary receiver and secured bond and qualified	2
	10. March 16, 1956, prepared and filed sixty-day report under Rule 22	1
	11. August 24, 1956, prepared and filed motion for order directed to holder of real property to transfer same	2
	12. September 11, 1956, prepared, appeared before the Court, and filed an order to holder of real property to transfer same	2
	13. October 12, 1956, prepared and filed motion for temporary restraining order, preliminary injunction and permanent injunction	3
	14. October 12, 1956, secured temporary restraining order signed by Court	1
	15. October 25, 1956, appeared before Court and secured preliminary injunction after argument	2
	16. November 3, 1956, trip to Burgess, Virginia, to secure possible purchasers	16
	17. November 5, 1956, prepared contract with Frank J. Kilduff and O. Dewey Cockrill	1
	18. January 4, 1957, prepared and filed motion to remove Court file to District Court of the United States for the Eastern District of Virginia	1
	19. January 4, 1957, appeared before the Court and secured order to remove Court file	1
	20. January 7 and January 8, 1957, in Richmond, Virginia, before the United States District Court, Eastern District of Virginia, arguing motion to vacate judgment	36

		Hours
	21. January 17, 1957, prepared and filed petition for leave to enter contract	1
152	22. January 22, 1957, secured from Court an order granting leave to enter said contract	2
	23. May 27, 1957, trip to Richmond, Virginia; conference with Lawyers' Title Company of Richmond	14
	24. June 8, 1957, trip to Burgess, Virginia, to confer with Miss S. Louise Blundon	16
	25. September 5, 1957, prepared and filed motion for immediate sequestration of certain real property	1
	26. Prepared Deed meeting the requirements of Lawyers's Title Company of Richmond, Virginia	
		116

Plus Additional Pleadings Prepared:

(a) Petition of receiver for leave to join in and execute a deed to certain real property and order for same — 1 Hour

(b) Preparation and filing of a motion to vacate judgment in the case of Milton E. Canter and Louis Urow, plaintiffs, v. Blundon Investment Corporation and S. Louise Blundon, defendants, Civil Action No. 2250 in the District Court of the United States for the Eastern District of Virginia at Richmond, together with points and authorities, certificate of service, notices to all parties, memorandum of law, and certification of notice of hearing on motion — 30 Hours

Plus Miscellaneous Phone Calls and Correspondence

	50 Hours	81
TOTAL TIME INVOLVED		201 Hours

153 **Expenses Incurred**

		Amount
1.	Two round trip flights to Richmond, Virginia, via Eastern Airlines at the cost of $14.41 each	$ 28.81
2.	One overnight stay in Richmond, Virginia, including meals	10.00
3.	Two trips by automobile to Burgess, Virginia, at a cost of 5¢ per mile -- Each round trip 272 miles, or a total of 544 miles	27.20
4.	Telephone calls to Reedsville, Virginia, and Richmond, Virginia	21.78
5.	Sam Webb Real Estate, Kilmarmock, Virginia -- For appraisal fee	35.00
6.	George C. Howard -- Bond Premiums (See Attached Statement)	70.00
	Total Expenses	$192.79

Plus Court Costs:

(a)	Filing pleadings in United States District Court for the Eastern District of Virginia	$ 15.00	
(b)	Filing costs in the United States District Court for the District of Columbia	6.55	21.55
	TOTAL EXPENSES		$214.34

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156 [Filed December 6, 1957]

OPPOSITION OF INTERVENORS MILTON E. CANTER AND LOUIS UROW TO PETITION OF TEMPORARY RECEIVER FOR COMPENSATION

Come now intervenors Milton E. Canter and Louis Urow and oppose the petition of the temporary receiver herein for compensation, and as grounds therefor state as follows:

1. The order of this court, entered October 17, 1957, dissolving two injunctions whereby the temporary receiver caused to be restrained attempted public sales of two tracts of land in Virginia, the property of

defendant corporation, under a deed of trust securing payment of a note of the corporation payable to the intervenors herein, was conditioned upon payment to the receiver of reasonable compensation out of the proceeds of any such sales. At the hearing on the motions upon which the order was issued, the court reserved for the hearing upon the instant petition for compensation argument as to whether the receiver should receive any compensation whatever in the premises.

The record herein.

2. Since the receiver was not appointed at the instance of these intervening mortgagees, since these mortgagees did not acquiesce in said appointment, and since these mortgagees derived no benefit from the receivership, the necessary intent of the aforementioned condition
157 subsequent to the dissolution of the injunctions must have been that the compensation of the receiver, if any, should be paid out of such portion of the proceeds of any such sales as may remain after the mortgage held by these intervenors, and mortgages held by others similarly situated, have been satisfied.

Aetna Life Insurance Co. v. Leonard, 186 F. 148.

Nicholson v. Western Loan & Building Co., 60 F. 2 516.

Metropolitan Trust Co. v. Lake Cities Electric Co., 100 F. 897.

Spencer v. Taylor Creek Ditch Co., 194 F. 635.

104 A. L. R. 991-992, 996.

45 Am. Jur., Receivers, sec. 277, pp. 215-217.

Clark on Receivers (2d Ed.), sec. 641.

3. The receiver should receive no compensation for his activities and expenses in connection with the injunctions obtained by him herein restraining foreclosures under two deeds of trust, to wit, for items 6, 7, 11-17, 21, 22, 25, 26 and (a), totalling 36 hours, and for pertinent expenses, as set forth in the statement annexed to his petition for compensation. At the conference with intervenors on November 30, 1954, referred to in item 3 of receiver's statement, the receiver was informed that defendant corporation appeared to have no assets other than the land in Virginia, that recorded encumbrances thereon exceeded its

fair value, and thus that this property could not possibly enure to the benefit of stockholders and general creditors of the corporation. This information was, or should have been, speedily confirmed by the receiver. Its accuracy is demonstrated by the appraisal of the property subsequently reported to the court by the receiver, as contrasted with the encumbrances listed on Schedule B, Section 1, Item 3, of the Interim Title Insurance Binder, annexed to his motion for sequestration herein. Hence said activities by the receiver were improvident, or conducted in bad
158 faith to establish a basis for compensation and to harass the mortgagees, and no compensation should be allowed therefor.

The record herein.

Nowell v. International Trust Co., 169 F. 497, cert. den. 217 U. S. 603.

4. The receiver should receive no compensation for his activities and expenses in connection with his motion in the United States District Court at Richmond to vacate the judgment obtained by the intervenors against defendant corporation upon the note secured by their deed of trust, to wit, for items 18-20, 23, and (b), totalling 82 hours, and for pertinent expenses. Said motion, brought without the authorization of this court, was maliciously contrived by the receiver to harass, embarrass and inconvenience the intervenors, to put them to great expense, and to create for the receiver a record of activity for which he could seek compensation. In denying the motion, Judge Albert V. Bryan, after finding that there was no basis for the receiver's charge of fraud, stated, on page 5 of his memorandum opinion, a copy of which is hereto annexed as Exhibit A:

> "But, at all events, the receiver has wholly failed to point to any defect in the judgment; he completely fails to plead or prove any defense to the note or deed of trust. Neither when or since he enjoined the foreclosure of the deed of trust in August, 1955, has he questioned its validity in any way. Therefore, if the court vacated the judgment, there is no ground for believing the receiver is possessed of any defense to these obligations."

Canter et al. v. Blundon Investment Corp. et al., Civil No. 2250, United States District Court for the Eastern District of Virginia at Richmond, Memorandum By The Court.

Darling v. Constable Products Co., 54 F. 2d 670.

Rule 11, Federal Rules of Civil Procedure.

5. The receiver should receive no compensation for his activities and expenses in connection with his alleged attempts to sell the lands of defendant corporation, to wit, for items 16, 17, 21-26, and (a), total-
159 ling 52 hours, and for pertinent expenses.

(a) The order authorizing the sale of a portion of the lands of the corporation was invalid, since it was beyond the scope of the authority conferred upon the receiver in his order of appointment. Inasmuch as the receiver was merely a temporary receiver, empowered only to take possession of corporate assets and to intervene in litigation, inasmuch as the corporation has never been alleged to be insolvent, and inasmuch as the several appointments of the receiver were not sought, or acquiesced in, by any judgment creditor of the corporation, power in the temporary receiver to liquidate its assets cannot be implied.

Shapiro v. Wilgus, 287 U.S. 348, 355-356.

(b) A federal court cannot confer upon a receiver power to distribute assets of a foreign corporation.

Barron & Holtzoff, Federal Practice and Procedure, 1957 Supplement, sec. 1452, citing Marion v. British Type Investors, 94 F. Supp. 755.

Noxon Chemical Products Co. v. Leckie, 39 F. 2 318.

6. The receiver should receive no compensation for the claimed telephone calls and correspondence, since they clearly relate to the non-compensatory activities hereinbefore described.

7. The receiver should receive no compensation whatever, since both his appointments were invalid.

(a) The appointment of November 4, 1954, was invalid:

(1) Movant failed to serve a copy of the motion upon defendant corporation, after learning that counsel upon whom service was

attempted had previously withdrawn from this cause.

(2) Movant was not a judgment creditor of defendant corporation.

Shapiro v. Wilgus, 287 U.S. 348, 355-356.

(b) The appointment of January 16, 1956, was invalid:

160 (1) The motion upon which the appointment was made was oral.

(2) The motion was without notice to defendant corporation or other interested parties, and there was no showing of extraordinary circumstances warranting an ex parte appointment.

(3) The motion was brought in collusion with the receiver to enable him to circumvent Title 28, Section 754, of the U.S. Code, which requires a receiver to file credentials within ten days of his appointment to retain possession of property located in another jurisdiction.

(4) Movant was not a judgment creditor of defendant corporation.

(5) The order of appointment recites that it was granted "upon consideration of the oral motion of attorney for defendant, Ben Lindas, individually, and as President of Blundon Investment Corporation", wherefrom it appears that the court was advised and believed that defendant corporation, by its president, had consented to the appointment of a temporary receiver. However, said Ben Lindas was not president of defendant corporation on January 16, 1956, and had not occupied that office since February 23, 1954.

The record herein.

Rule 7(b) (1), Federal Rules of Civil Procedure.

Central West Public Service Co. v. Craig, 70 F. 2 427.

Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F. 2 400.

Noxon Chemical Products v. Leckie, 39 F. 2 318, 321, cert. den. 282 U. S. 841.

Haven v. Brundage, 13 F. 2 617.

45 Am. Jur., Receivers, sec. 87, page 80; sec. 91, pages 81-82.

8. The receiver should receive no compensation whatever on the further grounds:

(a) That his appointment was improvident, no receiver being necessary or advisable in the premises.

161 Central West Public Service Co. v. Craig, 70 F.2 427.

(b) That, shortly after his original appointment on November 4, 1954, and long before his reappointment on January 16, 1956, the receiver should have advised this court of his inability to accomplish anything for the benefit of anyone having an interest in, or a claim against, defendant corporation.

Nowell v. International Trust Co., 169 F.497, 505, cert. den. 217 U.S. 603.

(c) That he failed to comply with the direction of this court, in both orders of appointment, to enter his appearance in pending litigation. Among the matters litigated wherein the receiver should have, but did not, enter his appearance to protect the interests of the stockholders of the corporation were two causes in the Circuit Court for Northumberland County, Virginia, one of which was a suit by the majority stockholder to recover all of the lands owned by the corporation (Blundon v. Blundon Investment Corp. et al.), and the second was a suit whereby an apparent fee estate in a valuable tract owned by the corporation was held to be only an estate for the life of a tenant thereon (Blundon v. Blundon). Another cause in which the receiver should have intervened was a suit by the corporation in this court for an accounting and other relief relative to property formerly owned by it in the District of Columbia (Blundon Investment Corp. v. Lloyd R. Turner and Ben Lindas, Civil No. 2021-54.). This suit has been dismissed for lack of prosecution.

(d) That he failed to comply with the order of this court, issued October 25, 1956, expeditiously to sell the lands of the corporation. As to one of the tracts, known as "Old Church Tract", the record fails to disclose any efforts by the receiver to consummate a sale, or even to determine its value, yet these intervenors have been restrained from foreclosing thereon since August 18, 1955. As to the other tract, known

as "Burgess Farm", the receiver submitted to the court but one contract of sale, as to which the proposed purchaser required title free from in-
162 cumbrances, a condition which the receiver knew he could not meet. If the receiver was unable to comply with said order, it was his manifest duty to so advise the court, in order that the injunctions restraining the mortgagees from foreclosing upon these tracts might be lifted, and that the mortgagees might pursue the remedies which had so long been denied them.

The record herein.

(e) That he has not been candid with this court, or that he has been grossly negligent in making representations to this court, or both:

(1) The order of appointment of January 16, 1956, which appears to have been drawn by the temporary receiver, recites that the motion was brought by Ben Lindas not only individually, but as president of defendant corporation. The temporary receiver knew, or should have known, that said Ben Lindas was not then the president of defendant corporation, that he was, in fact, hostile to the corporation, and that in this very action he had filed a substantial cross-claim against it. These facts are amply demonstrated by the file in this cause:

On July 6, 1955, said Lindas filed an amended answer requesting an order directing the corporation to return certain stock to him, and seeking a judgment against the corporation for $3, 175 with interest, and a fee for services rendered. Attached thereto was a copy of his resignation as president of defendant corporation on February 23, 1954, and its acceptance by the corporation.

On August 30, 1955, said Lindas filed a motion for summary judgment against the corporation for the relief prayed in his amended answer.

On September 19, 1955, said Lindas filed an objection to a motion by defendant corporation to strike his pleading. Attached thereto was another copy of his resignation as president of defendant corporation
163 on February 23, 1954, and the acceptance thereof by the corporation.

On January 7, 1956, nine days before his oral motion for the appointment of a receiver, said Lindas filed an amended answer in which, once again, he stated that he had resigned as president of defendant corporation on February 23, 1954.

The record discloses that defendant corporation has been represented by local counsel at all relevant times.

The record herein.

(2) His motion for a temporary restraining order, filed on or about August 18, 1955, stated that the land of the corporation in Virginia was involved in this proceeding, whereas he well knew that the instant action is founded in tort for money damages.

(3) His motion for sequestration, filed on or about September 5, 1957, his assurances to the court relating to a sale by him of lands of the corporation, and even item 26 of the statement annexed to his petition for compensation, indicate an ability to meet the conditions imposed by the title company precedent to approval of title, whereas the receiver well knew that he was unable to meet these conditions.

The record herein.

Fischer v. Liberty National Bank & Trust Co. in N. Y., 61 F. 2 757, aff'g 53 F. 2 856, cert. den. 288 U. S. 611.

(f) That his conduct throughout the receivership has been negligent and irresponsible, as evidenced by his delinquency in filing reports to this court, and by his very statement attached to his petition for compensation, wherein the total of alleged hours should be 113, rather than 116, and the grand total of alleged hours should be 194, rather than 201.

The record herein.

(g) That he has realized no funds, property or any other assets whatsoever for the benefit of the corporation, its stockholders, and has

164 done nothing to preserve or maintain the property, or to pay the taxes thereon, and that the sole result of his activities has been to increase the liability of the corporation for accrued interest on obligations secured by its property, and to cause great and unnecessary expenses, delay, and inconvenience to its secured creditors.

City of New Orleans v. Malone, 12 F.2 17.

WHEREFORE, the intervenors respectfully submit first, that in the premises and upon the record, reasonable compensation for the receiver is no compensation whatever, and, second, that if this court should determine that some compensation should be allowed to the receiver out of the proceeds of any sale of the lands of the corporation by trustees heretofore enjoined herein from conducting such sale, no part of such compensation should be paid to the receiver until the obligations secured by the respective deeds of trust have been fully satisfied.

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166 [Filed December 6, 1957] EXHIBIT "A"

MEMORANDUM BY THE COURT

This is a motion under Rule 60 (b) F. R. C. P. to vacate and set aside, as against the defendant Blundon Investment Corporation, the final judgment entered herein on October 3, 1956. The motion, filed December 5, 1956, is made by the receiver of the Corporation appointed by the United States District Court for the District of Columbia. The judgment granted the plaintiffs a recovery against the Corporation and its co-defendant, S. Louise Blundon, jointly and severally, in the sum of $15,000.00, interest and costs, based upon a promissory note executed by both defendants and payable to the plaintiffs. In addition, $1,500.00 was awarded the plaintiffs against the Corporation alone in reimbursement of expenses incurred by the plaintiffs and recoverable under the terms of the deed of trust given to secure the payment of the promissory note. The receiver was not a party to the action; he grounds his motion on charges of surprise, fraud and invalidity in the judgment.

* * * * *

167 * * * on November 4, 1954, the District of Columbia Court appointed a temporary receiver for the Corporation, authorizing him to take immediate possession of the corporate assets and enter his appearance in any current litigation for the protection of stockholders and creditors

of the Corporation. * * * * *

* * * * *

168 On January 16, 1956, the receiver's appointment was revoked but he was reappointed on the same day. The revocation and reappointment was an effort by the receiver towards meeting the requirement of section 754, Title 28, United States Code, that a receiver within 10 days of his appointment should file his credentials in any other district wherein he claims property. * * * * *

* * * * *

Assuming that in the circumstances the receiver is one entitled to move under Rule 60 (b) for the vacation of the judgment, he has not shown such facts as would warrant the relief he has prayed.

The principal operations of the Corporation were in Virginia, it was domesticated in that State, its chief assets were there, the plaintiffs' security was there, and the co-maker of their note resided in Virginia. Consequently, commencement of the action in this court, rather than in the District of Columbia, was not a circumvention of the receiver.

169 Moreover, the action was adversary throughout. There was no collusion whatsoever between the plaintiffs and the defendants, the Corporation and its interests being fully and competently defended and asserted. The Corporation was not injured or prejudiced by the absence of the receiver.

* * * * *

* * * the Corporation was still suable alone and in personam despite the receivership, but the plaintiffs could not, in the absence of the receiver as a party, obtain such a judgment against the Corporation as would bind its assets. This the plaintiffs concede. They do not pretend to disturb the receiver's control or custody of the land. Hence the absence of the receiver as a party to the action did not invalidate the judgment. Indeed, he was not available in Virginia for service of process. Cf. Schwartz v. Randolph, 1934, 4 Cir. 72 F. 2d 892.

* * * * *

170 But, at all events, the receiver has wholly failed to point to any

defect in the judgment; he completely fails to plead or prove any defense to the note or deed of trust. Neither when or since he enjoined the foreclosure of the deed of trust in August, 1955, has he questioned its validity in any way Therefore, if the court vacated the judgment, there is no ground for believing the receiver is possessed of any defense to these obligations, Assmann v. Fleming, 1947, 8 cir. 159 F. 2d 332, 336; Saenz v. Kenedy, 1950, 5 cir. 178 F. 2d 417.

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171 [Filed December 17, 1957]

ORDER

This cause came on to be heard upon the petition of James C. Toomey, temporary receiver herein, for compensation for services and expenses, and the opposition thereto of Milton E. Canter and Louis Urow, intervenors herein, and the temporary receiver having been heard in support of said petition and said intervenors having been heard in opposition thereto, it is by the Court this 17th day of December, 1957,

ORDERED, that ~~the~~ James C. Toomey as the temporary receiver be compensated in the amounts of Two Thousand Nine Hundred and Ten ($2,910.00) Dollars for services, and Two Hundred Fourteen Dollars and Thirty Four Cents ($214.34), for expenses, out of the proceeds of any sales of the lands of defendant corporation by the trustees heretofore restrained herein from conducting such sales, said compensation to be an expense of any such sales, and to be paid prior to the distribution of the proceeds thereof to the beneficiaries of the respective trusts, and it is further

ORDERED, that the trustees under the deed of trust of the tract known as "Burgess Farm", located in Fairfields Magisterial District, Northumberland County, Virginia, under which a public sale has been advertised for December 14, 1957, make no distribution of the proceeds

172 thereof until this Court has determined whether there should be an apportionment of the compensation of the temporary receiver between the beneficiaries of the first and second trusts thereon.

* * * * *

173 [Filed December 31, 1957]

ORDER

This cause came on for determination of whether compensation to be paid the receiver should be proportioned between the intervenors, Lloyd R. Turner, Milton E. Canter and Louis Urow, and the said intervenors having been heard, it is, by the Court, this 31st day of December, 1957,

ORDERED, That the compensation ordered to be paid the temporary receiver in the amount of $2,910.00 and $214.34 for expenses shall be apportioned between the beneficiary of the first trust, Lloyd R. Turner, and the beneficiaries of the second trust, Milton E. Canter and Louis Urow, equally, each paying 50 percent of said compensation and expenses.

/s/ Alexander Holtzoff
JUDGE

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175 [Filed January 10, 1958]

NOTICE OF APPEAL

Notice is hereby given this 10th day of January, 1958, that Milton E. Canter and Louis Urow, intervenors herein, hereby appeal to the United States Court of Appeals for the District of Columbia from the orders of this Court entered on the 17th day of December, 1957, and on the 31st day of December, 1957, respectively, in favor of James C. Toomey, temporary receiver of defendant Blundon Investment Corporation, against said Milton E. Canter and Louis Urow.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed February 13, 1958]

1 Washington, D. C.

Monday, December 9, 1957.

The above-entitled action came on for hearing on petition of James C. Toomey, Receiver, for compensation, before The Honorable ALEXANDER HOLTZOFF, United States District Judge, at 10 o'clock a. m.

* * * * *

2 MR. TOOMEY: This matter comes before the Court on my petition, as Receiver, for compensation for services rendered.

To briefly refresh the Court's recollection, there was a hearing I would say approximately a month ago, at which time the Court ordered that two injunctions which I had procured be dissolved, and on the 4th of November the Court ordered that -- I stand corrected on that date -- the Court signed two orders dissolving the injunctions. I am reading from one order which the court signed which provides that:

> "The injunction entered herein on the 22nd day of October, 1956, be and the same is hereby dissolved upon the following conditions."

The first condition is that proper notice be given to all parties. The second is:

> "That James C. Toomey, Esquire, Receiver appointed herein, shall receive a reasonable fee for services rendered in the above entitled cause of action out of the proceeds of said real property, and that said reasonable fee shall be determined by this Honorable Court, after the filing of a statement of services by said James C. Toomey."

3 The other order was similar in intent and did contain the two conditions, namely, that notice be given prior to any public sale; and secondly, that the receiver receive a reasonable fee, said fee to be fixed after submission of statement of services and hearing.

Late Thursday, after six o'clock, of the week immediately past, I was served by Mr. Urow with opposition of interveners Milton E. Canter

and Louis Urow to my petition for compensation. The opposition is quite lengthy. I don't know whether the Court has had an opportunity to examine it yet or not.

THE COURT: No. I always avoid examining papers in advance so as to avoid gaining any ideas before the case is argued.

MR. TOOMEY: If I may, then, I will proceed in the order that Mr. Urow has seen fit to prepare his opposition. His first point, and I am reading from Paragraph 1 of such opposition, sets out:

> "At the hearing on the motions upon which the order was issued, the Court reserved for the hearing upon the instant petition for compensation argument as to whether the receiver should receive any compensation whatever in the premises."

He is referring to the order vacating the injunctions.

THE COURT: No. Where I reserved -- apparently there is a misunderstanding on the part of counsel. All I reserved was the amount of the compensation. I ruled that there should be compensation, so I suggest that you confine your argument to the amount of the compensation. What are you requesting?

MR. TOOMEY: I have in my statement of services set out that I consumed 201 hours. I stand corrected, by the good graces of Mr. Urow--my secretary or myself was incorrect in the addition; it should be six hours less or 194 hours, which would change my final figure which I computed at the rate of $15 an hour; the total amount was $3,015, but it would be 15 times 6 hours less that, or $90 less, because of my error in the addition.

THE COURT: What is the amount you now request?

MR. TOOMEY: I am now requesting $2,925 which includes certain expenditures which I incurred, which are itemized in the statement of services, and amount to $192 and some cents.

THE COURT: It was the Court's view that whatever fee is paid should be paid out of the proceeds of the sale.

MR. TOOMEY: That is correct, Your Honor.

THE COURT: And should not be assessed against the parties personally.

MR. TOOMEY: That is correct.

THE COURT: Very well.

5 MR. TOOMEY: Continuing on with the opposition which has been filed, Messrs. Canter and Urow take the position that:

> "Since the receiver was not appointed at the instance of these intervening mortgagees, since these mortgagees did not acquiesce in said appointment, and since these mortgagees derived no benefit from the receivership, the necessary intent of the aforementioned condition subsequent to the dissolution of the injunctions must have been that the compensation of the receiver, if any, should be paid out of such portion of the proceeds of any such sales as may remain after the mortgage held by these intervenors, and mortgages held by others similarly situated have been satisfied."

As a matter of fact the order which appointed me appointed me to retain possession of all of the property until further order of the Court or until a permanent receiver had been appointed.

At the time of my appointment it is my recollection that Messrs. Canter and Urow filed strenuous opposition to the appointment of any receiver, and the point was thoroughly argued before Your Honor, and Your Honor reached the conclusion that a receiver should be appointed in this particular case.

6 THE COURT: Yes. I was particularly moved to that conclusion because my recollection is that -- and it may be in error -- it was Mr. Lindas who appeared for the corporation and not only consented to the appointment of a receiver but suggested that in his opinion a receiver should be appointed.

MR. TOOMEY: That is correct, Your Honor, according to the record.

THE COURT: So that both the plaintiff and the defendant in the original action consented to the appointment of the receiver.

MR. TOOMEY: Of course the position of these intervening mortgagees is puzzling to my mind because they were the attorneys who represented certain parties -- the corporation, as a matter of fact -- and they had withdrawn, according to my recollection, a short while prior to my appointment, but they were fully aware of the appointment, and after I had filed my petition for compensation all parties have indicated they would not object to the filing of my statement of services and to the amount contained, other than Messrs. Canter and Urow, and they are the sole ones who have come forward.

Paragraph 3 of the opposition of the opponents contends that I should not receive compensation for my work in connection with the injunctions obtained restraining foreclosures under two deeds of trust. They base their reasoning on this:

7 "At the conference with intervenors on November 30, 1954, referred to in Item 3 of receiver's statement, the receiver was informed that defendant corporation appeared to have no assets other than the land in Virginia, that recorded encumbrances thereon exceeded its fair value, and thus that this property could not possibly inure to the benefit of stockholders and general creditors of the corporation. This information was, or should have been speedily confirmed by the receiver."

Fortunately, in this particular case, other counsel in the case, the principal counsel in the case, those representing the plaintiff and defendant, were most cooperative with me. I was made fully aware of all lands, including lands down in Virginia, which my opponents refer to later in their rather voluminous opposition.

The foreclosures that were then pending down in Virginia and attempted were stopped by my efforts because they were an attack on the property and the only asset held by myself as receiver. It was my duty to come in and protect that property.

As regards these gentlemen and this conference they refer to, I did appear at their suggestion and I appeared with a witness and they refused to be frank with me one whit about the affairs of this corpora-
8 tion -- they who knew the most of the affairs of this corporation, or should have known.

The fourth point in the opposition is that I should receive no compensation for my activities and expenses in connection with filing a motion to vacate the judgment secured by them in Richmond, Virginia, in the Federal Court. They say that I did so without authority of court.

It came to my attention that a judgment had been secured on a note against the corporation in Virginia, unbeknownst to me. I filed a motion in that court seeking to vacate such judgment, and I think it was clearly within my duties as spelled out in my order of appointment. Further, a judge of this court considered a motion filed by myself to remove certain court files from this court and remove them to the jurisdiction of the Eastern District of Virginia, and the court granted an order permitting me to remove the files to that jurisdiction, which certainly indicates clearly that the court was by implication authorizing me to proceed with any such action.

The fifth point my opponents contend that I should receive no compensation in connection with my alleged attempt to sell the lands of the defendant corporation because I have no authority to sell. The order of October 26, 1956, is contained in the record. The Court said:

9 "The receiver, James C. Toomey, shall proceed as receiver to bring about the sale of said properties under court order as expeditiously as possible."

At every stage, in attempting to consummate this sale, I appeared before the court, secured permission of the court to enter into a contract, appeared before the Court, secured permission to enter into the proposed sale.

The next major point produced by my opponents is that:

"The receiver should receive no compensation whatever, since both his appointments were invalid."

THE COURT: Well, I am not going to go into that. You need not labor that point, Mr. Toomey.

MR. TOOMEY: Very well.

THE COURT: I am not going to hold that my own action was invalid, especially when it was done with consent of both plaintiff and defendant.

MR. TOOMEY: That appears to be the last major point other than that my appointment was improvident, no receiver being necessary or advisable in the premises. That, again, refers back directly to what Your Honor has referred to.

My opponents make the point on page 6 that shortly after my original appointment on November 4, 1954, and long before my reappointment on January 16, 1956, I should have advised this court of my inability to accomplish anything for the benefit of anyone having an interest in, or a claim against, the defendant corporation.

Such is not a fact, because as my records set out, I traveled to Reedsville, Virginia, just a matter of several months ago, and at that time I still had high hopes that I could bring about a free sale.

THE COURT: I don't think I need go into all these details. I have no doubt that everything you did was done in the exercise of your sound judgment, and the only issue for me to determine is what the fee should be.

MR. TOOMEY: Very well, Your Honor.

MR. UROW: If the Court please, I represent one party, mortgagees in this case, that have heretofore been restrained by Your Honor from foreclosing their mortgage, and I am myself one of these mortgagees.

At the outset, Your Honor, I would like to submit to the Court the proposition that if the Court decrees some compensation for this receiver, under all the law no part of that compensation should be borne by the mortgagees in this case. I think that it is the universal law, and I have cited many cases and authorities to the effect that where the appointment of a receiver has not been sought by mortgagees, when they

derive no benefit from the receiver, then any expense of the receiver
11 should not be borne by the mortgagee.

THE COURT: Will you cite me your authority? Give me your best case on that point.

MR. UROW: Aetna Life Insurance Company v. Leonard, 186 F. 148.

Another case, if Your Honor desires--

THE COURT: No; give me your best case.

In what jurisdiction is the one you just cited?

MR. UROW: I am sorry, I don't have it.

THE COURT: Always have the jurisdiction when you cite a case.

Very well, you may proceed.

MR. UROW: There are two points that Mr. Toomey raised that I would like to advert to now, perhaps out of order. The first is Mr. Toomey stated we appeared at the time the motion for his appointment as receiver was heard and objected thereto. Mr. Toomey is in error.

THE COURT: I don't think it would make any difference whether you appeared and objected or not. I appointed a receiver because the plaintiff moved for the appointment. The defendant acquiesced, and not only acquiesced but agreed that there should be a receiver.

MR. UROW: Yes, Your Honor. Now, on that point the Court has stated that this receivership was created with the consent of the defendant corporation. That from the record does not appear to be the fact.
12 Mr. Lindas did appear and it was upon his motion that the receivership was granted. It is also true that the order recites that he did appear and as President of the defendant corporation he moved that this receivership be formed. However, Mr. Lindas was not at that time president of the defendant corporation.

THE COURT: I am not going to go into that at this time. That is water that has flowed under the bridge. The point is that when the matter was before me on the appointment of a receiver the plaintiff moved for the appointment of a receiver; the defendant -- and I have to assume that Mr. Lindas had the right to represent the defendant -- agreed to the

receivership. Now, even if he hadn't agreed, I granted the motion for appointment of receiver, and if there was any error in granting it there should have been an appeal, and there was no appeal taken from the order granting the receivership, so we will start with the major premise that the receivership is valid.

You may proceed.

MR. UROW: The first point that I have raised in my memorandum as to the compensation of the receiver has to do with the injunctions that he has procured against us which have now been outstanding for almost three years.

It is our contention that at the very outset the receiver knew or should have known that there was no purpose he could serve for the
13 benefit of the creditors of the corporation or the stockholders or anyone else in procuring the injunction.

THE COURT: But this Court granted the injunction so I have to assume that the injunction was properly granted. I think it was granted by another judge, was it not?

MR. UROW: I believe it was.

THE COURT: I am naturally not going to hold that the injunction was improvidently granted, and if it was not improvidently granted it was not improvidently applied for.

I am going to confine my decision to the amount that the receiver should receive for compensation.

MR. UROW: My point is not an attack on the granting of the injunctions but rather this, that when the receiver discovered, as he should have soon after these injunctions were granted, that they could serve no useful purpose, then it was his obligation to come into court and --

THE COURT: I have gone into this. I felt that up to the time I granted the motion to vacate the injunction that they were serving a useful purpose.

Now, Mr. Urow, I will only hear you and I will hear you for as long a time as you reasonably want to take, as to the amount of the

award and the manner in which it should be made.

MR. UROW: The only manner in which I can approach that prob-
14 lem is to divide the services which the receiver alleges he performed into different categories, and it is my position that for each of these he should not receive compensation. The first is that concerned with the injunction.

THE COURT: I won't hear you on that because in my opinion the injunction served a very useful purpose up to the time it was vacated. So I am going to assume that the services that have been rendered were reasonably necessary and were within the sound discretion of the receiver.

After all, lawyers frequently differ as to what it is necessary to do, but that doesn't mean that the lawyer who says it is necessary is necessarily wrong merely because some other lawyer thinks it is necessary. Lawyers differ just as doctors.

MR. UROW: That is true, but circumstances may arise where it appears perfectly clear that there is but a single course of action, and I insist that those circumstances are present in this case.

We also maintain that the receiver should receive no compensation for his efforts in connection with the motion which he brought in the United States District Court at Richmond. In that court we obtained judgment upon our note, the note which is secured by the mortgage that we are now discussing. After that litigation was terminated Mr. Toomey came in and sought to have that judgment set aside. That was not at that
15 time pending litigation, and so it was without the scope of his authority as receiver to intervene there. Secondly, he had absolutely no basis for attempting to set that judgment aside. I have appended to my motion the memorandum of the court which denied that motion. Mr. Toomey alleged we had been guilty of fraud. The Court found that there was no fraud. And then the Court further said this, and I quote it on page 3 of my opposition papers:

> "But, at all events, the receiver has wholly failed to point to any defect in the judgment; he completely fails to

plead or prove any defense to the note or deed of trust. Neither when or since he enjoined the foreclosure of the deed of trust in August, 1955, has he questioned its validity in any way. Therefore, if the Court vacated the judgment, there is no ground for believing the receiver is possessed of any defense to these obligations."

That is the end of the quotation.

THE COURT: Of course, the mere fact that a lawyer loses a case is no reason for not paying him.

MR. UROW: Yes, Your Honor, but it is our position he had absolutely no basis for bringing his motion, and I think that is substantially shown by the memorandum of the Court. And the effect of the receiver's motion in this case is to have us not only bear the expense we were put to in resisting his motion, but to pay him for bringing it.

16 It is our further position, Your Honor, that the receiver should receive no compensation for his activities and expense in connection with his attempts to sell the lands of the defendant. It is true that there was an order of the court, not issued by Your Honor, directing him to sell lands of the corporation. However, we submit that no court could issue an order enabling the receiver to exercise powers which Your Honor had not granted him in his original power of appointment. He was just a temporary receiver. Your Honor did not order him to liquidate--

THE COURT: I am not going to hold my order is invalid.

MR. UROW: I am pointing out that Mr. Toomey was a temporary receiver. He was not empowered to liquidate the corporation. He was only empowered to preserve the assets pendente lite.

THE COURT: Well, preserving the assets pendente lite might involve transforming assets into cash also.

MR. UROW: That is true in certain extraordinary circumstances such as when assets are in danger of deterioration, but that is not this case, and it has never been so alleged.

We maintain that that was without the scope of his authority as receiver and so he should not receive any compensation on that ground.

17 There is another point there, Your Honor. A federal court cannot confer upon a receiver power to distribute assets of a foreign corporation. This corporation is a foreign corporation. It was incorporated in Delaware. It conducts all its business in Virginia, and so on that further ground, Your Honor, the receiver had no power to sell the land.

THE COURT: I think you are quite right that this court would have no jurisdiction to order the distribution of assets. That doesn't mean, however, that this court would have no right to order the transformation of assets into cash, but the final distribution of assets, of course, would not be in the power of this court, this being a foreign corporation.

MR. UROW: Yes, but in the order that authorized the receiver to sell, or even before that, the only time we appeared in this case, or the first time we appeared in this case, was in opposition to a preliminary injunction --

THE COURT: Very well; I get your point on that.

MR. UROW: Now, our next point has to do with the items in the statement of services recouping compensation for correspondence and telephone calls that have to do with the activities which we have discussed, and if he is entitled to no compensation for those activities then he is entitled to no compensation for expense that relates to it.

18 The next point we raise, Your Honor, is the question of the validity of the appointment. His first appointment Your Honor has already said Your Honor does not desire to go into the validity of that appointment. However, I do wish the Court to be informed as to why we do say his two appointments were invalid. The first appointment on November 4, 1954, was made without notice to the defendant corporation, and I think that that is a serious--

THE COURT: The defendant corporation is not here objecting. I don't think you have any standing to raise that objection.

MR. UROW: Only in this regard, Your Honor, if I may submit it, that if that appointment was invalid -- not merely voidable, but void --

then any activity he performed under such appointment he should receive no compensation for.

THE COURT: No, I am not going to hold my own order invalid especially when neither of the parties claim it invalid, so don't consume the time of the Court arguing the question of the validity of the appointment of the receiver.

MR. UROW: Very well. I go on to point 8 of my opposition papers in which I specify various grounds for which we believe generally that the receiver should receive no compensation; or, to put it in another way, just compensation for the receiver in this case is no compensation.

Our first point there is that his appointment was improvident be-
19 cause a receiver was not necessary.

THE COURT: I am going to ask you to resume your seat if you keep on arguing a point that I said I would not pass on.

MR. UROW: My second point is that the receiver unnecessarily prolonged the receivership; that he should have advised the court long ago that he was unable to accomplish anything for the benefit of anybody, and so the receivership should have been terminated; that he did not do that. That he could not accomplish anything is amply demonstrated by the record to which I have referred in my papers.

My next point under that subject, Your Honor, is that the receiver has failed to comply with the orders of this Court to enter his appearance in pending litigation, that was provided for therein.

The only litigation I know about that was important to the corporation was down in Virginia whereby the majority stockholder sought to recover to herself all of the land of the corporation.

Mr. Toomey recently filed a motion for sequestration to which he attached a memorandum by a title company. That memorandum indicates that that action is still pending. I was informed otherwise. Be that as it may, there is no showing that Mr. Toomey ever intervened in that very important piece of litigation.

20 THE COURT: I don't think I am going to go into all these details. There is a difference of opinion, a perfectly honest difference of opinion

between you as a lawyer and the receiver as a lawyer as to whether the receiver should have taken different steps, or that step or the other step. The receiver is an officer of the court and he has to use his very best judgment, and unless you can show either an entirely improvident action or neglectful action, the mere fact you disagree with the action that was taken is nothing that will result in a denial of the motion.

MR. UROW: As to this point it is our position that the receiver was negligent in not intervening in litigation which I have cited.

THE COURT: I am going to overrule that.

Now, you could help the Court if you would do this, Mr. Urow, if you would express your views, if you have any, on the question as to what you would urge as fair and reasonable compensation to the receiver, assuming, arguendo, that the Court will award a fair and reasonable but modest fee for all the services he has rendered.

MR. UROW: It is our position that the receiver is entitled to no compensation whatever.

THE COURT: I am asking you, and I will give you an opportunity to help the Court, by stating if you desire to do so -- you are under no compulsion to do so -- or to suggest a figure that you would consider
21 reasonable for the services actually rendered. That doesn't commit you to anything, of course, or waive any of your rights, but you might help the Court if you did so.

MR. UROW: If the Court please, I would like to say first that there is no such figure; and secondly, of course it is very important to us if Your Honor could see fit at this time to amplify the conditions imposed upon the dissolution of the injunction that the receiver should receive compensation by determining whether in the event the proceeds of the sale are not sufficient to satisfy the mortgages, the receiver shall be paid after the mortgages are satisfied, or if not, what the order of priority should be.

THE COURT: What do you contend?

MR. UROW: I contend that the receiver under no circumstances should receive anything until these mortgages have been paid in full.

I believe that is the import of the case that I have cited to Your Honor, and other cases cited in my memorandum, and also the import of all the authorities that I have seen on the subject.

THE COURT: Yes, but you don't want to comment on the amount of compensation?

MR. UROW: No, Your Honor.

THE COURT: I am giving you the opportunity and I would be glad to entertain any comments that you wish to make.

22 Very well.

MR. PEARSON: May the defendant be heard? I represent the Blundon Investment Corporation.

THE COURT: Yes, indeed, you may be heard.

MR. PEARSON: If Your Honor please, the action itself is one brought by an individual against this defendant corporation and against--

THE COURT: What is your position on opposing the motion?

MR. PEARSON: The motion for compensation, Your Honor, we do not oppose. However, I would like to state this. The case is pending, it is at issue. The defendants deny the allegations set forth by the plaintiff, and now we come to a position where a receiver must be paid for reasonable services.

I point out to Your Honor that the proposition is that the receiver is going to be paid from assets belonging to one or two of these defendants against whom the plaintiff has proved nothing as of this point. In the event that the defendants should prevail at trial the receiver will have been paid from assets belonging to an innocent party.

I respectfully suggest to Your Honor that the plaintiff, who asked for the receiver in the initial instance ought to be compelled to post a bond to secure the defendants from a loss which they might sustain by reason of payment for the receiver.

23 THE COURT: What do you say about the amount of the compensation requested?

MR. PEARSON: I have no argument about that, Your Honor.

THE COURT: Very well.

MR. INTRATER: If Your Honor please, I represent the plaintiff, Mary Seaman Harris.

THE COURT: Very well.

MR. INTRATER: If Your Honor please, first of all I would like to point out that whereas in our complaint--

THE COURT: No, suppose you tell me what position you take on this motion.

MR. INTRATER: With regard to the compensation we have no objection to the compensation to the receiver in any amount that the Court sees fit. From our examination of the pleadings filed by the receiver we do not feel that he is in any way out of line in his request for compensation.

My remarks basically are addressed now to the remarks just made to the Court. I would like to point out that in our complaint we did indeed ask for the appointment of a receiver.

THE COURT: I am not going to direct you to post bond such as was asked for by Mr. Pearson.

MR. INTRATER: We have a woman who is destitute and she could not post bond.

24 THE COURT: No, I see no reason for posting such a bond.

THE COURT: Mr. P. Bateman Ennis entered an appearance for Mr. Ben Lindas, and I notice that the receiver's petition was served on him.

MR. TOOMEY: May I inform the Court on that? I talked to Mr. Ennis on Friday and he authorized me to state to the Court that they have no opposition to the petition.

THE COURT: Mr. Schneider filed an appearance for one Lloyd R. Turner and a copy of the petition was served on you. Do you wish to be heard?

MR. SCHNEIDER: The only position, if Your Honor please, that we wish to take is that I represent the holder of the first trust and also represent the trustees on the first trust. We are going to foreclose.

Carrying out the instructions in your order signed about a month ago we have notified all parties of the sale to be held on December 14 at 10 o'clock. We have also sent the copies of the ad which appeared in the newspaper in Heathsville, Virginia.

The only position I take now, if Your Honor please, is I want to know in what order we are to pay these various mortgages that follow us, and claims.

It is my feeling, representing the holder of the first trust as well as the trustees on that deed of trust, if Your Honor please, that we must follow the dictates of the deed of trust which call for the payment of all
25 mortgages and liens and other claims.

I am merely here, if Your Honor please, to find out in what order Your Honor wants us to pay from the proceeds after, of course, the first trust and costs are paid.

About a month ago, when I was before Your Honor I set forth that I was opposed to any fee to be paid to Mr. Toomey, and Your Honor at that time overruled my objection.

THE COURT: What about the amount?

MR. SCHNEIDER: I don't want to comment about the amount at all.

26 RULING BY THE COURT

THE COURT: We have presented here a very unusual situation. Upon the motion of the plaintiff, to which the defendant consented, the Court appointed a temporary receiver. Ordinarily a receiver is paid either a set fee or a commission out of the assets that come into his hands. Here the receiver's statement shows that he performed a great many services, with great diligence, which required considerable skill as well as expenditure of time. His efforts, however, did not result in his obtaining title, as receiver, to any of the assets claimed to belong to the corporation.

The principal asset of the corporation is a parcel of real property. This Court issued a temporary injunction against the foreclosure of deeds of trust on this property pending the receiver's effort to obtain a

purchaser. Unfortunately, the receiver's efforts in that regard were unsuccessful, through no fault of his own, and thereupon, on motion of the holders of the deeds of trust, the injunction was vacated. The matter before the Court is the award of compensation to the receiver.

It is the Court's opinion that while ordinarily a receiver's compensation must be awarded and paid out of the assets that came into his hands, that nevertheless this is not an inflexible rule. Obv iously, the receiver here should receive fair compensation for his services. All of the parties except the holders of the deeds of trust admit that the

27 receiver should be paid, and none of them question the amount requested by the receiver. The only contest is on the part of the holders of the deeds of trust. The holders of the deeds of trust claim that no receiver should have been appointed. Obviously, they are not in position to question the appointment at this late date, especially when both the plaintiff and the defendant desired the appointment of a receiver. They also question whether certain services were necessary or properly rendered. The Court overrules the opposition based on that ground.

The Court invited counsel for the holders of the deed of trust, who presented the only opposition on this motion, to discuss the question of the amount of fees, and they declined to do so. It is a fair inference that they feel they are not in position to question the amount requested, if it is assumed that the services were properly rendered, and the Court holds that they were.

Accordingly, the Court awards the fees and expenses to the receiver as prayed for, to be paid out of the proceeds of the foreclosure sale of the property referred to.

* * * * *

30 MR. UROW: The Court has ruled that the receiver's compensation shall be an expense of the sale. I submit to the Court that in effect that means that the entire fee will be paid by us who are the second mortgagees, and I submit to the Court that that doesn't seem to be quite fair.

THE COURT: What is your suggestion?

MR. UROW: Well, of course, my position, that I explained earlier, is that the receiver should be paid after the mortgagees have been paid in full.

THE COURT: I know, you explained that earlier, and I am going to overrule that.

MR. UROW: My present point is that if any such payment is ordered it should not be made so that the second mortgagees should have to bear the entire expense of the receivership proceeding; that it should be borne by others.

31 THE COURT: Your thought is that it should be apportioned as between the first and second mortgagees?

MR. UROW: Either that it should be apportioned or paid -- and this is a point perhaps a little out of place -- but it should be borne by the plaintiff or --

THE COURT: No. The plaintiff is impecunious and there is no reason why it should be paid by the plaintiff, but I think there may be some merit in your thought that there should be an apportionment as between the first and second mortgagees.

I will hear counsel for the first mortgagee on that.

MR. SCHNEIDER: The only point I want to make is it would be contrary to the deed of trust which is on record and which we are going to foreclose. The trustees under that deed of trust must first pay the mortgage and any expense incurred as a result of the deed of trust. Your Honor, as I understood, said that Mr. Toomey's fee would be part of the sale.

I find myself in a rather peculiar position in trying to advise my clients --

THE COURT: What I mean by saying "part of the sale," that it shall come out of the proceeds of the sale -- that was my ruling -- just as the other expenses of the sale, that should be considered one of the expenses to come out of the proceeds of the sale.

32 Now, of course, gentlemen, you may be worrying about nothing at all. It may be that the property will bring a considerable amount over

and above both trusts and neither of you will need worry.

MR. SCHNEIDER: We may have to worry if it doesn't meet that situation. If the property just brings enough to pay the first trust --

MR. TOOMEY: I was going to state to the Court that there has been between two very interested groups in that part of the country an offer up to $29,600 which would be more than ample to meet all expenses.

THE COURT: You mean more than ample to create a surplus?

MR. TOOMEY: Yes.

THE COURT: Gentlemen, I am going to suggest this, that I think this matter is premature, but if the property doesn't bring enough to cover both trusts then you may bring this question of apportionment to my attention. I will hear you on that, Mr. Urow, at that time.

* * * * *

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 15 1958
Joseph W. Stewart
CLERK

No. 14,346

MILTON E. CANTER,

and

LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY,
Temporary Receiver of Defendant
Blundon Investment Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

2

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QUESTIONS PRESENTED

In the opinion of appellee, the questions presented are:

1. May appellants, as intervenors in the main action, to-wit, Harris v. Blundon Investment Corporation, et al., Civil Action No. 543-54, attack orders appointing a temporary receiver and other orders and adjudications of the District Court entered prior to their intervention.

2. Are beneficiaries of a deed of trust, procured from a defendant corporation subsequent to the initiation of litigation involving said realty, bound by an order of the Court directing that a preliminary injunction, enjoining foreclosure on said deed of trust, be vacated on condition that compensation of a receiver shall be an expense of the sale of said realty, where the appellants as said beneficiaries had constructive notice of the litigation lis pendens and/or where they had actual notice.

3. Was it an abuse of discretion by the District Court sitting as a court of equity, to determine the equities in the matter by holding that the compensation of a receiver should be an expense of the sale of realty involved in the main litigation where the encumbrance was placed on the realty subsequent to the initiation of the litigation.

4. Did the District Court abuse its discretion as to the amount of compensation which was awarded to the receiver.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,346

MILTON E. CANTER and LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY, Temporary Receiver of
Blundon Investment Corporation

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On February 10, 1954, Mary E. Seaman Harris filed a complaint against the Blundon Investment Corporation, Ben Lindas, S. Louise Blundon and T. D. Harris alleging that the corporation was the owner of certain parcels of land located both in the District of Columbia and the State of Virginia, which land was subject to mortgages or deeds of trust, all of which were past due and would be foreclosed in a short time; that the plaintiff was a preferred shareholder of the defendant corporation and the other defendants were the remaining shareholders and officers in said corporation; that she purchased stock in the corporation prior to

the activities complained of as a result of fraudulent misrepresentations; that the corporation had no money in its treasury at the time of the filing of the complaint and that the deeds of trust on the parcels of real property were past due and about to be foreclosed; that officers of the corporation have refused to cooperate with each other, and that no business is being transacted on behalf of the corporation; that the assets of the corporation are in jeopardy, and that a receiver should be appointed to take over the assets of the corporation so as to prevent irreparable damage to the corporation and the plaintiff (Appellants' App. 1-3).

On the same day a motion for the appointment of a temporary receiver was filed by the plaintiff and service was effected upon the corporation and the defendant, Ben Lindas. (Civil Action No. 543-54). Thereafter, on the 16th day of March, 1954, a motion to dismiss the complaint and to quash service on the corporation was filed on behalf of the corporation and S. Louise Blundon, defendants, by Milton E. Canter and Louis Urow, as attorneys for the aforesaid defendants (Record pg. 180). It appears that in late 1953, the exact date being unknown, Mr. Canter and Mr. Urow, the present appellants, who are members of the bar of the District of Columbia, with offices in the Barr Building, 910 Seventeenth Street, N. W., were engaged by S. Louise Blundon to represent her and possibly the corporation (Special App. 7). On February 8, 1954 S. Louise Blundon, on behalf of herself and the corporation, entered into a contract with Mr. Canter and Mr. Urow for professional services (Special App. 10). On February 10, 1954 the aforesaid complaint and motion for appointment of a receiver were filed by the plaintiff in the United States District Court for the District of Columbia. On March 29, 1954 S. Louise Blundon and defendant corporation, subsequent to the initiation of litigation, signed a note payable to Mr. Canter and Mr. Urow in the sum of Fifteen Thousand ($15,000.00) Dollars. On the same day the Blundon Investment Corporation deeded to Ralph A. Cusick and John James Bernard a deed of trust on lands known as "Burgess Farm", "Old Church Tract" and "Independence" to secure the aforesaid note of $15,000.00 reciting that the corporation was justly

indebted unto Milton E. Canter and Louis Urow in that amount (Special App. 2-5). The note was due six (6) months after date with interest at six (6%) percent. Prior to the payment date on said note, but during the Month of September, 1954, Mr. Canter and Mr. Urow filed a motion in Civil Action No. 543-54 in the United States District Court for the District of Columbia, to withdraw as counsel for the defendant corporation and Miss Blundon. In the meanwhile, to-wit, June 1954, Mr. Canter's and Mr. Urow's motion to dismiss the complaint was denied. Thereafter, on July 21, 1954, appellants answered the complaint for the corporation. On October 7, 1954, Ben Lindas, one of the defendants, mailed to Mr. Canter and Mr. Urow his motion to appoint a temporary receiver (Appellants' App. 6). This motion was filed October 12, 1954 (Appelants' App. 5). On October 12, 1954 an order was entered permitting Mr. Canter and Mr. Urow to withdraw as counsel for the corporation. Thus, at this juncture of the case Mr. Canter and Mr. Urow, as counsel for the corporation, were aware that the complaint prayed for the appointment of a receiver; that two motions for the appointment of a temporary receiver had been filed. It is inconceivable that Mr. Canter and Mr. Urow did not notify the corporation of the receipt of the motion which was mailed to them on October 7, 1954.

Thereafter, on November 4, 1954, an order was entered appointing James C. Toomey as temporary receiver of the corporation (Appellants' App. 6). This order was consented to by the attorney for the plaintiff and was made on motion of the defendant, Ben Lindas (Appellants' App. 6-7).

On August 18, 1955 the temporary receiver obtained a temporary restraining order and filed a motion for a preliminary injunction against John James Bernard, surviving trustee, from proceeding with the sale at public auction of two tracts of land known as "Burgess Farm" and "Old Church Tract", which were owned by the defendant corporation (Appellants' App. 10-11). On August 29, 1955 the motion for the preliminary injunction came on to be heard and was withdrawn (Appellants'

App. 12). However, the records of the Motion Clerk in said Court clearly show that among the persons present at the time the case was called were Mr. Canter and a man who is designated as "Lewis". Inasmuch as there is no person interested by the name of Lewis, one might well suppose that the person who was actually there was Mr. Louis Urow.[1]

On November 1, 1955, when both Mr. Canter and Mr. Urow were aware that the Blundon Investment Corporation was in the hands of a receiver and were on notice as to the authority of the receiver, to-wit, that the receiver obtained possession of all the assets of the corporation and enter his appearance in the now pending litigation involving the corporation for the purpose of protecting shareholders and creditors of the corporation (Appellants' App. 7), a suit was filed by Mr. Canter and Mr. Urow against the Blundon Investment Corporation and S. Louise Blundon in the United States District Court for the Eastern District of Virginia, Richmond Division, in Civil Action File No. 2250, praying for a judgment in the amount of Fifteen Thousand ($15,000.00) Dollars, with interest, jointly and severally, and a further judgment of Fifteen Hundred ($1,500.00) Dollars for attorneys' fees against the Blundon Investment Corporation. (Special App. 1-5). An answer was filed on behalf of both defendants by attorneys in Virginia, and on July 31, 1956, a stipulation was entered whereby the case was settled for the judgment prayed for with leave of forty-five (45) days to pay the same (Special App. 12-13). Mr. Ben Lindas appeared as one of the counsel for the defendants (Special App. 12). Thereafter, the monies not having been paid on the 15th day of September, 1956, judgment as prayed for was entered and the counter-claim of the defendants dismissed with prejudice.

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[1] A transcript of proceedings of this cause on August 29, 1955 cannot be obtained as the Court Reporter is dead, and the style he used was "Pitman". Counsel was informed that no other Court Reporter could translate the notes of the decedent sufficiently so that it could be authenticated. The records of the Motion Clerk's office, not being a part of the record in this cause, could not be designated. Inasmuch as they are Court administrative records, regularly kept, Appellee requests that judicial notice of the fact be taken.

On January 16, 1956 the Court vacated the appointment of appellee as receiver, copies of said order being mailed to counsel for the corporation (Appellants' App. 14) and on the same day reappointed Mr. Toomey as temporary receiver of said corporation with the same authority that he had previously had. Copies of this order were also mailed to the attorney for the corporation (Appellants' App. 15). Nothing was done by the corporation with regard to these orders. On October 12, 1956 the receiver obtained a temporary restraining order and moved for a preliminary injunction restraining John James Bernard, the surviving trustee, from selling at public auction the two tracts of land known as "Burgess Farm" and "Old Church Tract" (Appellants' App. 15-17). On the motion for preliminary injunction opposition was filed by Mr. Canter and Mr. Urow, as attorneys for the trustee. Following argument in open Court Judge Matthews issued the preliminary injunction on October 25, 1956 (Appellants' App. 19-20). On January 22, 1957 Judge Holtzoff ordered the receiver to enter into a contract to sell Burgess Farm Tract (Appellants' App. 20-21). On August 23, 1957 Mr. Canter and Mr. Urow moved for leave to intervene in the cause (Appellants' App. 21), and on September 6, 1957, they were granted leave to intervene (Appellants' App. 28-29). They filed a motion to dissolve the preliminary injunction heretofore referred to (Appellants' App. 22), and the cause came on to be heard before Judge Holtzoff on October 1, 1957, at which time he vacated the injunction on certain conditions, among which that the receiver be compensated out of the sale of said property as an expense of that sale (Appellants' App. 31). On December 6, 1957 appellee's petition for compensation came on to be heard before Judge Holtzoff and in a memorandum by the Court, he awarded the compensation predicated upon a fee of Fifteen ($15.00) Dollars per hour in the amount of Two Thousand Nine Hundred Ten ($2,910.00) Dollars, plus expenses of Two Hundred Fourteen Dollars and Thirty-Four Cents ($214.34) (Appellants' App. 43-46). Thereafter, on December 31, 1957, the Court ordered that the compensation to be paid the receiver be proportioned between the first trust holder and the second trust holder. An appeal from these orders were taken by appellants (Appellants' App. 46).

SUMMARY OF ARGUMENT

It is the settled rule of practice that intervenors in a receivership proceeding may not question the original order appointing the receiver, nor any orders concerning his conduct and activities prior to the intervention, for by virtue of such intervention the intervenors impliedly consent to all orders and decrees theretofore entered in the cause. United States v. California Cooperative Canneries, 279 U.S. 553, 556, 49 S.Ct. 423, 73 L.ed 838; Ex parte Jordan, 94 U.S. 248, 252, 24 L.ed 123; Lincoln Printing Company v. Middle West Utilities Company, (7th Cir.) 74 F.(2d) 779, 784, Cert. Denied, Sub. Nom. Pollach v. McCulloch, 295 U.S. 746, 55 S.Ct. 659, 79 L.ed. 1691; Harris Trust and Savings Bank v. Chicago Rys. Company, et al., 39 F.(2d) 958, 963; Rector v. United States (8th Cir.) 20 F.(2d) 845, 859.

Although there is a split in authority as to whether an intervenor may attack the jurisdiction of the Court, (Cf. Moore, Federal Practice, Second Edition, Volume 4, Section 24.16, Matthew Bender and Company, Inc., New York, New York) it is immaterial in this cause as the Court had ample jurisdiction over the parties and subject matter, State of Maryland for Use of Chrysler v. Eastern Airlines, U.S.D.C., D.C., 81 F. Supp. 345, 346.

Appellants being beneficiaries under a deed of trust involving realty in litigation prior to the execution of the encumbrances are bound by the order of the Court pertaining to said realty, both under the law of lis pendens and because they had actual notice of the litigation prior to the execution of the encumbrances. Armstrong v. Ashley, 22 App. D.C. 368; Wiswall v. Sampson, 55 U.S. 53, 14 L.ed. 322; Behrens v. Skelly, et al., (3rd Cir.) 173 F.(2d) 715.

Since the proceeding was an equitable one, the Court in determining equities did not abuse its discretion by requiring the compensation of the receiver to be charged as an expense of the sale of one foreclosing upon a deed of trust executed subsequent to the commencement

of the litigation. The amount of compensation awarded the receiver was within the sound discretion of the Court and no abuse thereof has been shown. Rector v. United States, supra.

Appellee requests this Honorable Court to take judicial notice of the pleadings and orders entered in Civil Action No. 2250 in the United States District Court for the Eastern District of Virginia, Richmond Division, wherein the parties are the same, and reference to which appellants have made in their brief and appendix. Fletcher v. Evening Star Newspaper Company, 77 U.S. App. D.C. 99, 133 F.(2d) 395.

ARGUMENT

INTERVENORS UNDER RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE ARE NOT PERMITTED TO ATTACK DECREES, ORDERS AND ADJUDICATION ENTERED PRIOR TO THEIR INTERVENTION

Appellants attack various orders and decrees of the Court entered prior to their intervention.[2] In addition they apparently attack the Court's refusal to hear them as to these matters. The status of intervenors in federal courts was formerly governed by Equity Rule 37. This rule was incorporated in the Federal Rules of Civil Procedure as Rule 24. The rule is substantially the same insofar as it concerns the instant case.

It is, "the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made".[3] Nor may an intervenor go behind orders actually made by the court as to

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2 These orders and decrees are contained in Appellants Statement of Points, Number 4-11, and comprise, that the appointment of the receiver was invalid and improvident; that the "sorry record" of the receiver shows his dereliction of duty, his "negligence" and "irresponsibility"; that the activities of the receiver (prior to intervention) were unauthorized and unwarranted and thus no compensation should be paid.

3 Lengthy citations in note 1 by Justice Brandeis are omitted. United States v. California Cooperative Canneries, 279 U.S. 553, 556, 49 S. Ct. 423, 73 L. ed, 838 (1929).

the administration of the property before they were admitted to defend.[4] Thus, "one who intervenes in a suit in equity thereby becomes a party to the suit, and is bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit."[5]

There appears to be a difference of opinion as to whether an intervenor may attack the jurisdiction of the court. One authority holds that under Rule 24, it was the intention to permit an intervenor to attack the "real jurisdiction" of the court.[6] Other authority holds that an intervenor may not even attack jurisdiction.[7] Nevertheless there was ample jurisdiction in the present cause when we consider the allegations of the complaint upon defendant corporation's motion to dismiss, which of course admitted all facts well pleaded,[8] for the purpose of testing jurisdiction. Plaintiff was a resident of Maryland, residing in a suburb of Washington, D. C.; defendant corporation was domesticated in Delaware but doing business in the District of Columbia. It had an office in said District wherein it held itself out to the public. It owned realty within the said District. The Defendant Lindas was a resident of the District of Columbia; S. Louise Blundon was a resident of Virginia, and T. D. Harris, a resident of South Carolina. The complaint alleged that the corporation had ceased doing business and its assets were in jeopardy.[9] It prayed for the appointment of a receiver. Clearly the Court had jurisdiction.[10]

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[4] Ex Parte Jordan, 94 U.S. 248, 252, 24 L.ed. 123.

[5] Galbreath v. Metropolitan Trust Co., of California, et al., 10th Cir., 134 F.2d 569, 570. (1943).

[6] Moore, Federal Practice, 2d Ed., Vol. 4, Sec. 24.16, Matthew Bender & Co., Inc., New York, New York.

[7] In Re V-I-D, Inc., 7th Cir. 177 F.2d 234 (1949).

[8] RECORD pg. 180.

[9] Appellants' App. 1-3.

[10] Cf. State of Maryland for Use of Chrysler v. Eastern Air Lines, U.S.D.C. D.C. 81 F. Supp. 345, 346. (J. Morris, 1948).
See also Appellee's App. pgs. 2, 3, 4.

Among the prior orders not subject to attack by intervenors are those directing the receiver's activities.[11] In the Lincoln Printing Company case,[12] the ~~Supreme~~ Court ~~of the United States~~ held:

> Under Equity Rule 37 we think it is clear that appellant as intervener could not question the original order appointing the receiver, nor could he rightfully demand that the original bill be dismissed.

The Court went on to point out that intervenors could not attack any of the prior activities of the receiver but could attack his present eligibility.[13]

From the foregoing it appears that there is no substance to Appellants' allegation that the Court would not permit them to argue matters concerning the appointment of the receiver and his conduct prior to the entrance of the intervenors.

In view of the strong language used by appellants in characterizing the conduct and reputation of the receiver[14] consideration will next be

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[11] Harris Trust & Savings Bank v. Chicago Rys. Co., et al., 39 F.2d 958, 963. (1929)

[12] Lincoln Printing Co. v. Middle West Utilities Co., 7th Cir., 74 F.2d 779, 784 (1935), Cert. den. sub nom. Pollach v. McCulloch, 295 U.S. 746, 55 S. Ct. 659, 79 L. ed. 1691.

[13] Idem.

[14] Appellants' Brief:

"collusive tactic" -- p. 12.

"The receiver was derelict" -- p. 14.

"The receiver has been less than candid with the court" -- p. 15.

"The entire course of the receivership has been marked by the negligence and irresponsibility of the receiver." -- p. 16.

"He recklessly instituted an unwarranted, and most expensive proceeding against the appellants," -- pgs. 16-17.

this "sorry record" -- p. 17.

The receiver's motion to vacate judgment in the United States District Court for the Eastern District of Virginia "was maliciously contrived to harass the appellants" -- p. 18.

The receiver obtained injunction "by misrepresentation" -- p. 19.

given to some of the points raised by appellants in their brief although they involve matters adjudicated prior to appellants entrance as intervenors.

First: A motion for the appointment of a temporary receiver was filed February 10, 1954 by the plaintiff and duly served on the corporation (Civil Action No. 543-54). Prior to the withdrawal of appellants as counsel for the corporation, they were served with a motion for the appointment of a temporary receiver (Appellants' App. 5-6). If, as appellants contend that "the corporation was never advised of the filing of the motion", then the fault is due solely to Mr. Canter and Mr. Urow who were apprised of the pendency of the motion prior to their withdrawal as counsel for the Corporation. Appellants cite no evidence that the Motion Clerk's Office did not notify the Corporation of the date set for the hearing on the motion.

Contrary to what appellants would have this Court believe by their failure to print the full memorandum of Judge Bryan, United States District Judge for the Eastern District of Virginia; that Court in refusing to vacate the judgment entered against S. Louise Blundon and the Blundon Investment Corporation, jointly and severally, for Fifteen Thousand ($15,000.00) Dollars, and against the Corporation alone for Fifteen Hundred ($1,500.00) Dollars, specifically denied Mr. Canter's and Mr. Urow's motion to expunge from the records of that Court, as unseasonably offered, the papers filed in that Court by the receiver on January 26, 1956 to establish his appointment (Appellee's App. 11 and Special App. 17, 18).

Appellants throughout their brief (See Appellants' Brief, pages 2, 3 and 13) contend that the defendant Lindas, a member of the bar of this Court, had an interest adverse to the Corporation from at least February 10, 1954 onward. Despite this contention of appellants, it is most interesting to note that the record in Civil Action No. 2250, in the United States District Court for the Eastern District of Virginia, reflects that on July 31, 1956, Ben Lindas, Esquire, appearing as counsel for the

defendants, among which was the Blundon Investment Corporation, entered into a consent judgment in favor of Mr. Canter and Mr. Urow for a total amount of Sixteen Thousand Five Hundred ($16,500.00) Dollars, plus interest (Special App. 12). Now, appellants seem to indicate that they were unaware of the receivership proceedings. We have pointed out that they were aware of the complaint and the motions filed for appointment of a temporary receiver. In fact, the records of the Motion Clerk's Office show that on August 29, 1955, when a motion for a preliminary injunction against the surviving trustee, Mr. Bernard, came on for hearing before Judge McGarraghy and was withdrawn, Mr. Canter and a man designated as "Lewis" appeared before that Court. There being, to appellee's knowledge, that no Mr. Lewis was involved in any of these proceedings, it can only be speculated that the Clerk was referring to Mr. Louis Urow.[15] Thus, on July 31, 1956 Mr. Canter and Mr. Urow knew beyond any shadow of a doubt that James C. Toomey was the receiver of Blundon Investment Corporation and were on notice that by virtue of his appointment he was authorized and directed to enter his appearance as attorney for the Corporation in any pending litigation (Record, 44, 91). Three months after appellants here were charged with such knowledge, they filed a suit in the State of Virginia praying for this $16,500.00 judgment (Special App. 1). They did not notify the receiver of this action that had been instituted, although their offices are located in the same building as the receiver, nor did they object almost one year later when Mr. Lindas entered into a consent judgment for the Corporation. The decision of Judge Bryan cannot be questioned but the facts upon which it was based are, in the mind of the receiver, open to much doubt. The position which appellants take in this Court is most contradictory. On the one hand they seek to have the District Court's order as to the compensation of the receiver reversed because Mr. Lindas had a position adverse to the Corporation from

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[15] See footnote 1, supra.

February 10, 1954 onward, and at the same time they predicate their claim for some $16,500.00, plus interest, on a consent judgment achieved by virtue of Mr. Lindas' representation of the Corporation when both he and appellants knew or were chargeable with knowing that he had no authority to represent the Corporation. Additional conflict between the records in the two causes can be indicated but it would serve only as cumulative evidence of what has heretofore been said.[16]

BENEFICIARIES UNDER A DEED OF TRUST EXECUTED SUBSEQUENT TO THE COMMENCEMENT OF LITIGATION INVOLVING SAID REALTY ARE BOUND BY THE ORDERS OF THE COURT EFFECTING SAID REALTY

It has heretofore been pointed out that appellants in the instant case had actual knowledge of the litigation in the United States District Court for the District of Columbia prior to the execution of the deed of trust under which they claim. The complaint was filed February 10, 1954 (Appellants' App. 1). The note as secured by the deed of trust under which appellants claim was executed March 29, 1954 (Special App. 2).[17] In addition, the rule of lis pendens applies. One who purchases property after a suit has been begun against the vendor with respect to the property purchased is chargeable with legal or constructive notice so as to render his purchase subject to the event of that suit, even though he may not have knowledge of the suit.[18] A Mortgagee or a beneficiary under a deed of trust is a purchaser from the vendor within the meaning of lis pendens.[19]

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[16] One further point deserves attention. Appellants in their brief attack the Receiver for failing to enter litigation wherein the corporation was involved (Appellants' App. 16). Amended Answer of defendant Lindas, states that he turned over to Mr. Canter and Mr. Urow all the records of the Corporation (Appellee's App. 2).

The 60-day report of the Receiver (Appellee's App. 1), states, that the Receiver has been unable to get records of the corporation. Why didn't Mr. Canter and Mr. Urow furnish them (See Appellants' App. pgs. 50, 51)?

[17] Cf. Armstrong v. Ashley, 22 App. D.C. 368, 377.

[18] Behrens v. Skelly, et al. (3rd Cir.) 173 F.(2d) 715, 718 and 719.

[19] Armstrong v. Ashley, 204 U.S. 272, 51 L.ed. 482; affirming 22 App. D.C. 368.

THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE EQUITIES IN THE MATTER NOR IN AWARDING THE AMOUNT OF COMPENSATION

In Atlantic Trust Company v. Chapman, 208 U.S. 360, 52 L.ed. 528, the Supreme Court held that a mortgagee who brings the proceedings for the appointment of a receiver was not liable for the excess costs and fees incurred above and beyond the receivership funds. There are other authorities who sometimes hold that one who causes the receivership, if he eventually loses, must bear the burden of the costs. However, in view of the fact that all such cases are determined on their own facts, the rule would be better stated thusly: That the Court shall determine the equities in the matter and charge the costs accordingly. In the instant case appellants procured a deed of trust subsequent to the initiation of litigation. The consideration was legal services rendered and not money (Special App. 5-11). Plaintiff in the action is without funds (Appellants' App. 64). In view of all these facts and in view of the proceedings which resulted in the judgment which appellants now claim as priority over the compensation of the receiver, it would seem most inequitable to refuse the receiver compensation out of the sale of these assets.

As has been heretofore pointed out, the District Court refused to permit appellants to argue the validity of the receiver's appointment and rightly so.[20] The Court continually requested the appellants to state what they believed to be the amount of compensation that should be awarded the receiver, and they refused to do so (Appellants' App. 59, 60, 63). Therefore, in view of the work performed by the receiver, and in view of the amount of assets that will be available, a fee of Fifteen ($15.00) Dollars per hour is not an abuse of discretion on the part of the District Court.

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[20] For they were intervenors and these orders were entered prior to their intervention.

JUDICIAL NOTICE

Appellee respectfully requests that this Honorable Court take judicial notice of the pleadings, judgments and orders entered in Civil Action No. 2250 in the United States District Court for the Eastern District of Virginia, Richmond Division, where the parties are the same and the subject matter is so entwined with the issues in this Court. Appellants have made reference to these proceedings and the whole proceedings should be reviewed by the Court in order to appreciate the equities of the case. This Court in Fletcher v. Evening Star Newspaper Company, 77 U.S. App. D.C. 99, 133 F.(2d) 395, held that not only may a District Court take judicial notice of its own records on a motion for summary judgment, but that the Court may take judicial notice of other cases, including the same subject matter or questions of a related nature between the same parties. Appellee concedes that the cases referred to by this Court in the Fletcher case do not involve taking judicial notice of a case in another Circuit. However, this Court is referred to the case of the City of Tucson v. The Tucson Gas, Electric and Power Company, (9th Cir.) 152 F.(2d) 552, 555 and 556, where the Court refused to take judicial notice of allegations appearing in pleadings in an Arizona State Court, because the parties were not the same. Had the parties been the same, the Court infers that judicial notice might have been taken. The Supreme Court of the United States has held that Federal Courts may take judicial notice of prior applications for writs of habeas corpus in other Federal Circuits.[21]

It would thus seem that as long as the subject matter and the parties are the same or related that the taking of judicial notice should not be confined to the boundaries of a Federal Circuit.

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[21] Wells v. United States, 318 U.S. 257, 260.

CONCLUSION

WHEREFORE, appellee respectfully requests this Honorable Court to affirm the order of the District Court from which this appeal has been taken.

Respectfully submitted,

JAMES C. TOOMEY,
Temporary Receiver for Blundon Investment Corporation, Pro Se,

WALTER E. GILLCRIST
Attorney for Appellee
910 - 17th Street, N. W.
Washington 6, D. C.

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APPENDIX FOR THE APPELLEES

47 Report Under Rule 22 [Filed Feb. 10, 1955]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY SEAMAN HARRIS)
)
Plaintiff,)
)
vs.) Civil No. 543-54
)
BLUNDON INVESTMENT CORPORATION, ET AL.)
)
Defendant.)

60 DAY REPORT UNDER RULE 22

* * * *

49 The following is a statement (for the preceding year) of all sales, transfers or other disposition of assets; and of investments and changes in form of assets, and the name in which each stands:

This temporary receiver, since his appointment, has attempted to locate assets of corporation, Blundon Investment Co., but has been unable to locate any in this jurisdiction. It is the understanding of this receiver that there is certain real property located in Virginia, but this receiver has been unable to get records of corporation.

* * * *

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51 AMENDED ANSWER OF DEFENDANT BEN LINDAS [Filed 7/6/55]

* * * *

52 FIFTH: That at no time, either before or after the formation of said Corporation, was any money paid into said Corporation by either S. Louise Blundon or T. D. Harris; that all necessary expenses were advanced by defendant, Ben Lindas; that at the request of T. D. Harris and S. Louise Blundon, the said defendant, Ben Lindas, negotiated a loan from a client of Lloyd R. Turner, a Washington Realtor, for the sum of $5000.00 of which sum $3500.00 was secured and at the request of T. D. Harris and S. Louise Blundon, the said sum was retained by

said defendant, Ben Lindas, to cover costs and expenses, and to be used toward the purchase of a building in the District of Columbia to be used as an office for said Corporation; that in an affidavit filed in this cause by S. Louise Blundon, there is set forth the facts regarding said loan and the office building that was purchased at 608 7th Street, S. E., Washington, D. C.

* * * *

53 EIGHTH: That the $3500.00 received by the said defendant, Ben Lindas, as proceeds from said $5000.00 loan and the amount received by the said defendant, Ben Lindas, from the sale of the Seaman note, was the only money received by said Corporation; that neither the said S. Louise Blundon or T. D. Harris ever invested one cent of cash; that from the amount received by the said defendant, Ben Lindas, all expenses were paid; that $4000.00 was expended to purchase 608 7th Street, S.W. to be the office of said Corporation; that $2100.00 was expended for repairs and remodeling; that the cost of survey, for sale signs, transportation were paid; that one years taxes were paid; that several small investments were made; that at the request of T. D. Harris and S. Louise Blundon, who secured the checks and delivered them, $4000.00 was advanced to Freda Coppedge to apply on guaranteed preferred stock dividends; that by September 1953, the said defendant, Ben Lindas, had expended $3500.00 more than had been received and that said Corporation executed a Note and Deed of Trust for the said sum to secure said defendant, Ben Lindas, for the money advanced, and personally agreed to by S. Louise Blundon, a copy of which consent is attached hereto.

* * * *

54 TENTH: That in November, 1953, said defendant was notified by Canter and Urow, Attorney of the District of Columbia, and Attorney for T. D. Harris, that they represented S. Louise Blundon and wished a statement of the financial condition of said Corporation; that a statement was delivered to said attorneys, together with vouchers, corporate minutes and correspondence; that said statement disclosed that there was due defendant, Ben Lindas, the sum of $3500.00 for money advanced by him.

ELEVENTH: That on February 23, 1954, said defendant, Ben Lindas, and Carrie P. Lindas, his wife, met with Canter and Urow at the office of said Attorneys, at which time the following proposition of settlement was made: That said defendant, Ben Lindas, surrender his stock; that said defendant, Ben Lindas and Carrie P. Lindas resign as members of the Board of Directors; that the stock of Freda Coppedge, that had been assigned to T. D. Harris in exchange for worthless property, be surrendered; that said defendant, Ben Lindas, release the Deed of Trust held by the defendant, Ben Lindas, as payment to him for money expended by him, on said Corporation property; that the said Corporation agreed that said defendant, Ben Lindas, was to be given a full and complete release; that all his acts as President would be ratified; that any personal claim between Freda Coppedge and S. Louise Blundon and T. D. Harris would be settled between them; that the Corporation would be dissolved and the property returned to S. Louise Blundon; that said defendant, Ben Lindas, would be paid the sum of $325.00. Defendant further states that in accordance with said agreement, the Deed of Trust was released, that said defendant, Ben Lindas, and Carrie P. Lindas cancelled said stock and resigned as Directors; that a full and complete release and ratification was signed in the office of Canter and Urow, by S. Louise Blundon, and in the presence of one Albert Weinstein, who afterward became President of said Corporation, that a check for $325.00 was given said defendant, Ben Lindas, and said defendant was informed that the entire matter was closed; that a copy of said release is attached hereto.

* * * *

55 THIRTEENTH: That the said Corporation failed to carry out any of its agreements with the said Ben Lindas; the Corporation was not dissolved, but was reorganized with one Albert Weinstein, the silent partner of T. D. Harris, as President, the property was not returned to S. Louise Blundon, but the said Albert Weinstein and T. D. Harris began systematically, to personally secure the assets of the Corporation for their personal use; Timber was cut and sold, with the proceeds given to T. D. Harris; interest on the Deeds of Trust were unpaid; the property

at 608 7th St., S. W. was sold at foreclosure, the property in Burgess was advertised for sale to pay the Deed of Trust of $5000.00; the Corporation, by a Note and Deed of Trust, signed by Albert Weinstein and S. Louise Blundon, as officers of the Corporation, issued its obligation in the sum of $6000.00 to pay a personal claim for fraud filed against T. D. Harris, wholly without consideration of any kind.

* * * *

66 MOTION FOR A TEMPORARY RESTRAINING ORDER, [Filed 8/18/55]
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

* * * *

67 On or about March 29, 1954, the deed of trust under which this sale is proposed to be held, was executed securing two attorneys in Washington, D. C., Milton E. Cantor and Louis Urow. Said monies, it is the allegation of the corporation, were advanced to said attorneys with the understanding that said attorneys should perform certain services in the interest of said corporation. It is the further allegation of the said corporation that the said services were not performed. An action was filed in the Circuit Court of Northumberland County, Virginia, which action sought to clarify this among other problems. However, service was not obtained on the said attorneys, Milton E. Cantor and Louis Urow.

* * * *

70 TEMPORARY RESTRAINING ORDER [Filed 8/18/55]

Upon consideration of the affidavit of James C. Toomey, temporary receiver duly appointed in the above captioned cause, and the application of said temporary receiver for a restraining order, pendente lite, against John James Bernard, sole surviving trustee under a certain deed of trust, dated March 29, 1954, from Blundon Investment Corporation, a Delaware corporation, to Ralph A. Cusick and John James Bernard, trustees, and recorded in the Clerk's Office of the Circuit Court of Northumberland County, Virginia, in Deed Book 99, page 191, from selling at public auction in Heathsville, Virginia, on Saturday, August 20, 1955, at 10:00 o'clock A.M., two certain tracts of land in Fairfields Magisterial District, known as "Burgess Farm" and "Old Church Tract", and it

appearing to the court that such sale would work an immediate irreparable loss to the parties to the above litigation, and that said John James Bernard, sole surviving trustee, should be immediately restrained, and that

71 there is no opportunity for delay to give a hearing in advance of such restraining order, it is, by the Court, this 18 day of August, 1955.

* * * *

97 MOTION FOR A TEMPORARY RESTRAINING ORDER, [Filed 10/12/56] PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

* * * *

98 On or about March 29, 1954, the Deed of Trust under which the sale of the property known as "Old Church Tract" is proposed to be held, was executed securing two attorneys in Washington, D. C., Milton E. Canter and Louis Urow. Said monies, it is the allegation of the corporation, were advanced to said attorneys with the understanding that said attorneys should perform certain services in the interest of said corporation. It is the further allegation of the said corporation that the said services were not performed. This temporary receiver is not aware of any determination of this question by any Court.

* * * *

101 TEMPORARY RESTRAINING ORDER [Filed 10/12/56]

Upon consideration of the affidavit of James C. Toomey, temporary receiver duly appointed in the above captioned cause, and the application of said temporary receiver for a restraining order, pendente lite, against Lloyd E. Turner and Vincent W. Bradley, trustees under a certain Deed of Trust, dated the 19th day of September, 1951, from Blundon Investment Corporation to Lloyd E. Turner and Vincent W. Bradley, and recorded in the Clerk's Office of the Circuit Court of Northumberland County, Virginia, in Deed Book 99, page 191, from selling at public auction in Heathsville, Virginia, on Tuesday, October 16, 1956, a certain tract of land in Fairfields Magisterial District, known as "Burgess Farm Tract"; and further, upon consideration of the application of said temporary receiver for a restraining order, pendente lite, against John J. Bernard, sole surviving trustee, under a certain Deed of Trust, dated March 29, 1954, from Blundon Investment Corporation to Ralph A.

Cusick and John James Bernard, trustees, and recorded in the Clerk's office of the Circuit Court of Northumberland County, Virginia, in Deed Book 99, page 191, from selling at public auction in Heathsville, Virginia, on Saturday, November 3, 1956, a certain tract of land in Fairfields Magisterial District, known as "Old Church Tract", and it appearing to the Court that said sales would work as an immediate irreparable loss
102 to the parties to the above litigation, and that said Lloyd E. Turner and Vincent W. Bradley, trustees, and John James Bernard, sole surviving trustee, should be immediately restrained, and that there is no opportunity for delay to give a hearing in advance of such restraining order, it is, by the Court, this 12th day of October, 1956.

* * * *

146 [Filed Oct. 7, 1957]

ORDER DISSOLVING INJUNCTION

This matter came on for hearing on a motion filed by Lloyd R. Turner to dissolve the injunction entered herein on the 22nd day of October, 1956 and after a full and complete hearing on said motion and it appearing to the satisfaction of the Court that the said injunction should be dissolved it is ~~by this Honorable Court~~ this 7 day of October, 1957.

ORDERED, that the injunction entered herein on the 22nd day of October, 1956 be and the same is hereby dissolved upon the following conditions:

(1.) That proper notice, in writing, be served personally or by registered mail to all parties named in this cause of action within a reasonable time prior to the date of any foreclosure on any real estate which was the subject of the injunction herein, and

(2.) That James C. Toomey, Esq., receiver appointed herein, shall receive a reasonable fee for services rendered in the above entitled cause of action, out of the proceeds of said real property and that said reasonable fee shall be determined by this Honorable Court, after the filing of a statement of service by said James C. Toomey.

/s/ Alexander Holtzoff
JUDGE

* * * *

EXHIBIT "A"

166 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

AT RICHMOND

[Filed Dec. 6, 1957]

MILTON E. CANTER and LOUIS UROW	)	
v.	)	Civil 2250
BLUNDON INVESTMENT CORPORATION and S. LOUISE BLUNDON	)	

MEMORANDUM BY THE COURT

This is a motion under Rule 60 (b) R.R.C.P. to vacate and set aside, as against the defendant Blundon Investment Corporation, the final judgment entered herein on October 3, 1956. The motion, filed December 5, 1956, is made by the receiver of the Corporation appointed by the United States District Court for the District of Columbia. The judgment granted the plaintiffs a recovery against the Corporation and its co-defendant, S. Louise Blundon, jointly and severally, in the sum of $15,000.00, interest and costs, based upon a promissory note executed by both defendants and payable to the plaintiffs. In addition, $1,500.00 was awarded the plaintiffs against the Corporation alone in reimbursement of expenses incurred by the plaintiffs and recoverable under the terms of the deed of trust given to secure the payment of the promissory note. The receiver was not a party to the action; he grounds his motion on charges of surprise, fraud and invalidity in the judgment.

The Corporation was chartered under the laws of Delaware. It owned property in the District of Columbia and had a nominal office there, but its principal asset was the land in Virginia described in the deed of trust, a large tract which it intended to develop. On February 10, 1954 an action was filed in the United States District Court for the District of Columbia by an alleged preferred stockholder against the Corporation, its officers and common stockholders, including S. Louise Blundon, co-defendant here. That action sought the appointment of a receiver to take over the assets and affairs of the Corporation, to operate it and to

167 liquidate its assets, with distribution to the plaintiff of the amount represented by her preferred stock.

The plaintiffs in the instant action are members of the bar practicing in the District of Columbia. They were retained and appeared for the Corporation in opposition to the receivership suit. On March 29, 1954, the Corporation and S. Louise Blundon, personally, executed and delivered to these plaintiffs a negotiable promissory note, of that date, for the sum of $15,000 payable, with interest, six months after date. Simultaneously, the Corporation executed and delivered a deed of trust upon the Virginia land to secure the payment of this note, the deed of trust being promptly recorded. These papers evidenced compensation owing to the plaintiffs by the defendant Corporation and S. Louise Blundon for legal services to be performed in the District of Columbia litigation and in other corporate and personal matters. Subsequently, S. Louise Blundon commenced an action in a State court of Virginia against the Corporation, the present plaintiffs and others, involving the Virginia property, the affairs of the Corporation, and the services of the plaintiffs. Thereupon, the plaintiffs here were allowed, at their request, to withdraw as counsel in the receivership action.

Thereafter, on November 4, 1954, the District of Columbia Court appointed a temporary receiver for the Corporation, authorizing him to take immediate possession of the corporate assets and enter his appearance in any current litigation for the protection of stockholders and creditors of the Corporation. The receiver did not then file in Virginia notice of his appointment and qualification as directed by section 754, Title 28, United States Code. In the course of his activities, on August 18, 1955, the receiver sought and obtained from his appointing court an order restraining the foreclosure of the deed of trust held by the plaintiffs and heretofore mentioned. On November 1, 1955, the plaintiffs filed the present action against the Corporation and S. Louise Blundon for judgment on their promissory note of $15,000.00 and recovery of the expense money of $1,500.00. Responsive pleadings were punctually filed on behalf of the defendants by Virginia counsel in association with an attorney of the

168 District of Columbia who had been president of the Corporation

and was a defendant in the receiver's action. At that time S. Louise Blundon held substantially all of the common stock of the Corporation.

On January 16, 1956, the receiver's appointment was revoked but he was reappointed on the same day. The revocation and reappointment was an effort by the receiver towards meeting the requirement of section 754, Title 28, United States Code, that a receiver within 10 days of his appointment should file his credentials in any other district wherein he claims property. To this end, he filed on January 26, 1956, copies of the order of his appointment, and the complaint in the receivership action, with the Clerk of this court at Richmond.

No notice of the existence of the present case was given the receiver before judgment. It came on for trial July 31, 1956. At that time a compromise stipulation was made in settlement of the controversy. The terms were submitted to the court and approved. By the composition, the defendants agreed to pay to the plaintiffs the sum of $15,000.00 on or before September 15, 1956. In default of that payment, the plaintiffs were entitled to judgment as prayed in their complaint, with dismissal of a counterclaim asserted by the defendants. The stipulation was not performed and, on October 3, 1956, the court upon appropriate motion entered the judgment now under attack. The court finds that both the plaintiffs and the defendants had actual or implied notice of the receivership from its inception; but it finds no fraud in the procurement or sufferance of the judgment.

Assuming that in the circumstances the receiver is one entitled to move under Rule 60 (b) for the vacation of the judgment, he has not shown such facts as would warrant the relief he has prayed.

The principal operations of the Corporation were in Virginia, it was domesticated in that State, its chief assets were there, the plaintiffs' security was there, and the co-maker of their note resided in Virginia. Consequently, commencement of the action in this court, rather than in the District of Columbia, was not a circumvention of the
169 receiver. Moreover, the action was adversary throughout. There was no collusion whatsoever between the plaintiffs and the defendants,

the Corporation and its interests being fully and competently defended and asserted. The Corporation was not injured or prejudiced by the absence of the receiver.

However, the court is of the opinion that section 754, title 28, United States Code invested the receiver "with complete jurisdiction and control ---- with the right to take possession" of the Virginia land and that he was not divested thereof through his failure to file his qualifying papers in this court within 10 days. The time provision of the statute is merely directory. The subsequent filing of the papers prevented the divestiture. As this was accomplished before the action and instituted in this court, the receiver was in control of the Virginia land at the time the plaintiffs brought their suit.

However, the Corporation was still suable alone and in personam despite the receivership, but the plaintiffs could not, in the absence of the receiver as a party, obtain such a judgment against the Corporation as would bind its assets. This the plaintiffs concede. They do not pretend to disturb the receiver's control or custody of the land. Hence the absence of the receiver as a party to the action did not invalidate the judgment. Indeed, he was not available in Virginia for service of process. Cf. Schwartz v. Randolph, 1934, 4 Cir. 72 F.2d 892.

The judgment simply further evidences the in personam liability of the Corporation - it conclusively fixes the personal obligations assumed in the note and deed of trust by the parties who executed those documents. In addition to their in rem claim upon the Virginia land by virtue of their deed of trust, the plaintiffs have the right to present and prove the judgment in the receiver as an in personam claim for their pro rata share of any distribution, which may be made to general creditors, of the liquidated assets of the Corporation. Consider Morris v. Jones, 1947, 329 U.S. 545, 549; Riehle v. Margolies, 1929, 279 U.S. 218; 225; Chicago Title and Trust Co. v. Fox Theatres Corporation, 1934, 2 cir. 69 F. 2d 60, 61; Schwartz v. Randolph, supra, 1934, 4 cir.
170 72 F.2d 892, 893; Dickinson v. Universal Service Stations, 1938, 9 cir. 100 F.2d 753, 757.

But, at all events, the receiver has wholly failed to point to any defect in the judgment; he completely fails to plead or prove any defense to the note or deed of trust. Neither when or since he enjoined the foreclosure of the deed of trust in August, 1955, has he questioned its validity in any way. Therefore, if the court vacated the judgment, there is no ground for believing the receiver is possessed of any defense to these obligations, Assmann v. Fleming, 1947, 8 cir. 159 F.2d 332, 336; Saenz v. Kenedy, 1950, 5 cir. 178 F.2d 417.

What has been said disposes of the motion of the plaintiffs to expunge from the records of this court, as unseasonably offered, the papers filed here by the receiver January 26, 1956 to establish his appointment. An order will be entered denying that motion and also denying the motion of the receiver to vacate the judgment. Of course, as to S. Louise Blundon the judgment stands unquestioned.

Adopting this memorandum as its findings of fact and conclusions of law, the court will, upon presentation, enter an order in accordance with the determinations herein made. Counsel will settle the order within 15 days.

(SGD.) ALBERT V. BRYAN

United States District Judge

Alexandria, Virginia.
March 12th, 1956.

SPECIAL APPENDIX

The following Pleadings, Judgments, Orders as contained in Civil Action File No. 2250, in The United States District Court for the Eastern District of Virginia, Richmond Division in the case of Milton E. Canter and Louis Urow, Plaintiffs v. Blundon Investment Corporation and S. Louise Blundon, Defendants:

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA

AT RICHMOND

MILTON E. CANTER and LOUIS UROW	)	Plaintiffs
	)	CIVIL ACTION
versus	)	NO. 2250
BLUNDON INVESTMENT CORPORATION and S. LOUISE BLUNDON	)	Defendants

COMPLAINT

1. The Plaintiffs, Milton E. Canter and Louis Urow are citizens of the State of Maryland and the District of Columbia, respectively. The Defendant, Blundon Investment Corporation, is a Delaware Corporation which has been domesticated in the State of Virginia, and the Defendant, S. Louise Blundon, is a resident of the State of Virginia. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. The Defendants, Blundon Investment Corporation and S. Louise Blundon, on or about March 29, 1954, executed and delivered to the Plaintiffs a promissory note, a photostatic copy of which is hereto annexed as Exhibit A, whereby the Defendants promised to pay to the order of the Plaintiffs on the 29th day of September, 1954, the sum of $15,000.00, with interest thereon at the rate of six per cent (6%) per annum until paid.

3. The Defendant, Blundon Investment Corporation, on or about March 29, 1954, executed and delivered to the Plaintiffs, a Deed of Trust securing the payment of the aforementioned note, a photostatic copy of which is hereto annexed as Exhibit B, whereby the Defendant, Blundon Investment Corporation, promised and agreed to pay to the holders of the note secured by said Deed of Trust, in addition to the principal and interest thereon, all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the Trustees or the holders of said note on account of any litigation at

law or in equity which might arise in respect to the trust or the property mentioned therein, and the Plaintiffs, as holders of the note secured by said Deed of Trust, have incurred counsel fees on account of litigation which has arisen in respect to the aforesaid trust in the sum of $1,500.00.

4. The Defendant, Blundon Investment Corporation, owes to the Plaintiffs the amount of said note and interest, and, in addition thereto, $1,500.00.

5. The Defendant, S. Louise Blundon, owes to the Plaintiffs the amount of said note and interest.

Wherefore the Plaintiffs pray for judgment against Blundon Investment Corporation and S. Louise Blundon for the sum of Fifteen Thousand Dollars with interest thereon at the rate of 6% per annum from the 29th day of March, 1954, and costs, and, in addition thereto, judgment against Blundon Investment Corporation for the sum of Fifteen Hundred Dollars ($1500.00) for attorney's fees.

/s/ Milton E. Canter
/s/ Louis Urow

/s/ T. Nelson Parker
***

/s/ Wm. C. Parkinson
***

Attorneys for Plaintiffs

EXHIBIT A

$15,000.00 March 29th, 1954

Six months after date we promise to pay to the order of Milton E. Canter and Louis Urow the sum of Fifteen Thousand and 00/100DOLLARS, for value received with interest at six per centum per annum until paid, payable quarterly. The maker or makers and endorsers hereof hereby

waive the benefit of their homestead exemption as to this debt; and also waive demand, protest, notice of presentment, notice of protest and notice of non-payment of this note.

Payable at Washington, D. C.

Note number _____ of _____ .

BLUNDON INVESTMENT CORPORATION

by /s/ Albert Weinstein
Albert Weinstein, President

Attest: /s/ S. Louise Blundon
S. Louise Blundon, Secretary

/s/ S. Louise Blundon
S. Louise Blundon, individually

Address _____

Witness:

This is to certify that this is _____ the _____ promissory note ____ described in a certain deed of trust of even date herewith, to the Trustees named in the margin hereof. Said note and the deed of trust securing same having been executed in my presence.

/s/ Marilyn A. Crawford
Notary Public.

My Commission Expires March 14, 1958.

SECURED BY DEED OF TRUST

To Ralph A. Cusick and John James Bernard Trustees.

Conveying _____

EXHIBIT B

THIS DEED

Made this 29th day of March, A.D. 1954, by and between the Blundon Investment Corporation, a Delaware corporation, party of the first part and Ralph A. Cusick and John James Bernard, trustees parties of the second part:

WHEREAS, the Blundon Investment Corporation is justly indebted unto Milton E. Canter and Louis Urow in the full sum of Fifteen Thousand and 00/100 Dollars for which sum the said corporation has made, executed and delivered its one certain promissory note of even date herewith, payable to the order of Milton E. Canter and Louis Urow, due six months after date, and bearing interest from date at the rate of six percent per annum, payable quarterly,

AND WHEREAS, the party of the first part desires to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said, parties of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and all money which may be advanced as provided herein, with interest on all such costs and advances from the date hereof.

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that the party of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to it in hand paid by the parties of the second part, the receipt of which, before the sealing and delivery by these presents, is hereby acknowledged, has granted, and does hereby grant unto the parties of the second part the following described land and premises, situate in the Northumberland County, Virginia, known and distinguished as

All those tracts, pieces and parcels of land in Fairfields Magisterial District, known as "Burgess Farm", "Old Church Tract" and "Independence", being the same tracts, pieces and parcels of land conveyed to the party of the first part by S. Louise Blundon by deed dated May 20, 1953, and recorded in the Clerk's Office of the Circuit Court of Northumberland County on September 30, 1953, in Deed Book 98 at page 9, a portion of which tracts, pieces and parcels of land were previously conveyed to the party of the first part by S. Louise Blundon by two deeds dated September 22, 1951, and recorded in said Clerk's Office on October 6, 1951, in Deed Book 93 at pages 29 and 30, respectively.

* * *

ANSWER TO COMPLAINT AND COUNTERCLAIM

ANSWER

For answer to the Complaint filed by Milton E. Canter and Louis Urow, the defendants Blundon Investment Corporation and S. Louise Blundon do answer and say as follows:

I

With respect to the allegations of paragraphs 1 and 2 of the said complaint, these defendants admit the allegations thereof; with respect to paragraph 3 of the said complaint, these defendants admit the allegations thereof in so far as they allege the execution and delivery of the deed of trust filed therewith as Exhibit "B"; these defendants are not advised as to the amount of counsel fees, if any, which the plaintiffs have incurred on account of litigation which has arisen in respect to the aforesaid trust, and they deny that any counsel fees which may have been incurred by the plaintiffs are chargeable to the defendant Blundon Investment Corporation according to the provisions of the said deed of trust; with respect to paragraphs 4 and 5 of the said Complaint, these defendants deny emphatically the allegations thereof and allege that neither of them is indebted to the plaintiffs in any sum whatever.

II

These defendants allege that the said note and deed of trust were executed and delivered in consideration of the undertaking of the plaintiffs to perform certain services as attorneys for these defendants and as security for the payment of such services when performed, but that not withstanding their undertaking the plaintiffs have wholly failed and refused to perform the services which were the consideration of the said note and deed of trust the material facts relating to the employment of the said plaintiffs by these defendants being as follows:

(a) That by written contract dated the 8th day of February, 1954, a copy of which is attached hereto marked "Defendants Exhibit A", the plaintiffs agreed to represent S. Louise Blundon and Blundon Investment Corporation "for the purpose of obtaining the elimination or reduction of all claims against said corporation by settlement or legal proceedings or otherwise; to marshal corporate assets; and to take steps leading to the dissolution of said corporation"; that as a fee for such services, the plaintiffs were to be entitled to twenty per cent of the reduction or elimination of claims and interests against the corporation;

(b) That on or about March 29, 1954, the plaintiffs, not having carried out their agreement of February 8, 1954, entered into a new agreement with these defendants by which they undertook to perform the following services for these defendants:

1. To obtain a loan of $35,000 on the real estate of the corporation located in Virginia to be secured by a deed of trust thereon;

2. To have an existing $5,000 deed of trust against the property cancelled;

3. To have the receivership ordered by the United States District Court for the District of Columbia in Civil Action No. 543-54 cancelled.

4. To eliminate a $10,000 claim against the Blundon Investment Corporation in the form of a stock certificate held by one Mary Seaman Harris; and

5. To prevent foreclosure of improved property owned by the Blundon Investment Corporation located at 608 7th St., S.W., Washington, D. C.; and

(c) That the plaintiffs have wholly failed and refused to perform the services which they undertook to perform by the agreements aforesaid which failure and refusal constitutes a complete defense to this enforcement of said note and deed of trust.

III

These defendants allege that the retainer contract of February 8, 1954, the oral contract of, on or about March 29, 1954, and the deed of trust and note were procured by the plaintiffs through the practice of actual, deliberate and premeditated fraud upon these defendants inasmuch as the plaintiffs knew at the time they induced the defendant S. Louise Blundon to enter into the retainer agreement of February 8, 1954, under which the most material services to be performed by the plaintiffs was to obtain the cancellation of a stock certificate for $50,000 of the stock of Blundon Investment Corporation held by one Freda Coppedge; that the said Freda Coppedge was ready and willing to surrender such stock certificate voluntarily, yet they, the plaintiffs, fraudulently withheld such information from these defendants and led them to believe when the deed of trust and note were executed on March 29, 1954 that such certificate had been surrendered through great effort on their part, the defendants subsequently ascertaining that said certificate was actually surrendered voluntarily through no effort or influence of the plaintiffs whatever.

IV

On December 11, 1953 the defendant S. Louise Blundon paid to Canter and Urow the sum of $250.00 as a balance of the retainer fee for their services, and these defendants allege that the said sum of $250.00 was more than ample to compensate the plaintiffs for any services which they may have performed for the defendants.

V

These defendants also allege that the defendant Blundon Investment Corporation cannot be held liable on said note for the reason that the officers who executed the same were not thereunto legally authorized by appropriate corporate action, and that the deed of trust of March 29, 1954 is wholly invalid and a nullity inasmuch as the corporate seal was not thereto affixed or thereon impressed.

VI

Counter Claims

These defendants allege further:

(a) That on February 10, 1954 the defendant, S. Louise Blundon, paid to Canter and Urow the sum of $300.00 to cover taxes and interest on the 7th Street property in Washington, D. C. owned by Blundon Investment Corporation and upon which there were mortgages; that on May 24th 1954 the same defendant paid to Canter and Urow $933.71 to cover the first and second mortgages on said property and the taxes of Blundon Investment Corporation in Delaware; that the said Canter and Urow failed to use the said sums for the purposes for which they were given and wrongfully and fraudulently appropriated such moneys for their own use; and that the defendant S. Louise Blundon is entitled to the aforesaid sum of $1,233.71 which is due and owing to her by the said plaintiffs;

(b) That the plaintiffs Canter and Urow failed to exercise the degree of care required of attorneys in preventing the foreclosure of the property known as 608 7th Street, S.W., Washington, D. C., and converted to their own use rather than paying over to the parties entitled thereto the moneys intrusted to them for this purpose by S. Louise Blundon, thus resulting in a foreclosure and loss of the said property whereby the Blundon Investment Corporation has been damaged and suffered loss to the extent to $10,000 which said amount is due to them by the plaintiffs;

(c) That the defendant Blundon Investment Corporation had procured sales of numerous lots of the properties embraced in the

said deed of trust, but was prevented from consumating such sales by the deed of trust thereon held by the plaintiffs which they refused to release although it had been fraudulently obtained, all of which resulted in a loss of as much as $5,000 to the defendant, Blundon Investment Corporation which said amount is due to it by the plaintiffs;

(d) That the defendant, Blundon Investment Corporation, has incurred divers expenses for travel of its officers and attorneys fees in and about this litigation to the extent of $4,000 arising from the fraudulent actions of the plaintiffs which said amount is due to it by the plaintiffs.

Wherefore these defendants pray that the action against it be dismissed; that an order may be entered cancelling the deed of trust and note set forth in the plaintiffs complaint; that judgment be awarded in favor of S. Louise Blundon against the plaintiffs in the sum of $1,233.71 with interest from May 24, 1954; that judgment be awarded in favor of Blundon Investment Corporation in the sum of $19,000 with interest from June 1, 1954; and that the cost of this proceeding be awarded against the plaintiffs.

S. LOUISE BLUNDON

BLUNDON INVESTMENT CORPORATION

by _____
Counsel

_____
Gordon Lewis
Tappahannock, Virginia

_____
A. Fleet Dillard
Tappahannock, Virginia

Counsel for Defendants

COPY

EXHIBIT A

RETAINER AGREEMENT

This Agreement made and entered into this 8th day of February, 1954, by and between Miss S. Louise Blundon, of Burgess, Virginia, her successors and assigns, hereinafter called Client, and the law firm of Canter and Urow, of Washington, D. C., hereinafter called Attorneys:

WITNESSETH

WHEREAS, Client prior to September 4, 1951, was the owner of three tracts of unencumbered real property in Northumberland County, Virginia;

WHEREAS, all of said property is now owned by Blundon Investment Corporation, a Delaware Corporation, wherein Client owns a majority of the outstanding common stock;

WHEREAS, There presently exists a series of alleged interests in, and claims against, the aforesaid corporation, of which the following is a partial list:

Freda Steelman Coppedge, 500 Shares, 6% Cumulative $100 par value preferred stock issued July 10, 1952.

Mary Seaman Harris, 100 Shares, 6% Cumulative $100 par value preferred stock issued June 12, 1952.

Ben Lindas, 50 Shares, Common $100 par value issued October 15, 1951, and October 20, 1951.

Trust to Lloyd R. Turner, $5,000.

Trust to Ben Lindas, $3,500.

WHEREAS, the Corporation has a number of outstanding claims, and also has assets and liabilities arising out of real estate transactions in which it has been involved;

WHEREAS, Client desires to dissolve the Blundon Investment Corporation and to recover for her own use the above mentioned three tracts of land, hitherto deeded to the Corporation by her, as free and clear of encumberances as may be possible under the circumstances, and to retain the abovementioned Attorneys to assist her in accomplishing this objective;

AND WHEREAS, Attorneys are willing to represent Client for the aforesaid purposes upon the following terms and conditions.

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. Said Attorneys do hereby agree to represent Client and Blundon Investment Corporation for the purpose of obtaining the elimination or reduction of all claims against said corporation by settlement or legal proceedings or otherwise; to marshal corporate assets; and to take steps leading to the dissolution of said corporation.

2. As its fee for its services hereunder, Attorneys shall be entitled to 20% of the reduction or elimination of claims and interests against the corporation presently outstanding.

3. No settlement or compromise of claims or interests asserted against the corporation shall be made by either party hereto without the written consent of the other party.

4. Client undertakes to have this Retainer Agreement assumed by the corporation as joint and several obligor thereunder.

Witness our hands and seals this 8th day of February, 1954, at Washington, D. C.

S. Louise Blundon

CANTER AND UROW

By: Milton E. Canter

Witness:

Albert Weinstein

STIPULATION

Before: Honorable Sterling Hutcheson,

District Judge

July 31, 1956

Appearances:

Wm. C. Parkinson, Esquire, and
Leith S. Bremner, Esquire,
for the Plaintiffs.

George R. Humrickhouse, Esquire, and
Ben Lindas, Esquire,
for the Defendants.

MR. HUMRICKHOUSE: Your Honor, I would like to dictate into the record a stipulation that we have entered into, subject to Your Honor's agreement.

The defendants, Blundon Investment Corporation and S. Louise Blundon, agree to pay to the plaintiffs the sum of $15,000 within 45 days, or say by September 15, 1956, and in event the $15,000 is not paid by September 15, 1956, it is stipulated and agreed that the Court may enter a judgment as prayed for in the complaint and dismiss the counter-claim filed by Blundon Investment Corporation and S. Louise Blundon; which will mean that the matter is really continued for the raising of cash, for 45 days, for a settlement. If they cannot raise it, then judgment will be entered as prayed for, which will mean a judgment for $15,000 against both defendants, a judgment of $1,500 additionally against the Investment Corporation for attorneys' fees.

I would like at this time, if Your Honor please, to have counsel for the plaintiffs state that they concur in the stipulation and I would also like to ask Miss Blundon if she thoroughly understands that, so that it may be dictated into the record and so that there may be no

misunderstanding on the part of anyone as to the settlement. We would like leave to file a written statement carrying this out, so that Your Honor would have a basis for entering judgment at the proper time if it is not settled.

There is one additional stipulation that I have not mentioned: That the defendants will make no additional attempts to prohibit or enjoin the sale of the property under the deed of trust if the judgment is entered, that is, after the expiration of the 45 days.

MR. PARKINSON: On behalf of the plaintiffs, we state that we concur in the stipulation.

I hereby certify that the foregoing is a true and correct transcript from my notes taken in the above-entitled cause.

September 15, 1956

Official Reporter

JUDGMENT

This day came the parties by their respective counsel and counsel for the plaintiffs moved the Court to enter judgment for the plaintiffs in accordance with the stipulation between the parties hereto made in open court on the 31st day of July, 1956, a transcript of which has been filed herein, and counsel for the defendants acknowledged that the defendants failed to pay to the plaintiffs the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00) by the 15th day of September, 1956, and the plaintiffs having filed herein the promissory note made by the defendants and deed of trust described in the complaint:

It is considered by the Court that the plaintiffs recover against the defendants, Blundon Investment Corporation and S. Louise Blundon, jointly and severally, the sum of FIFTEEN THOUSAND DOLLARS

($15,000.00) with interest thereon at the rate of six per centum per annum, from the 29th day of March, 1954 until paid, and the costs by them in this behalf expended.

And it is further considered by the Court that the plaintiffs recover against the defendant, Blundon Investment Corporation, the additional sum of FIFTEEN HUNDRED DOLLARS ($1,500.00) with interest thereon at the rate of six per centum per annum from date hereof until paid.

And it is ordered that the defendants' counter-claims be, and the same are, hereby dismissed with prejudice.

/s/ STERLING HUTCHESON
United States District Judge

OCTOBER 3, 1956

I ask for this:

/s/ Wm. C. Parkinson
Of Counsel for the Plaintiffs

I have seen this:

/s/ George R. Humrickhouse
Of Counsel for the Defendants.

MOTION TO VACATE JUDGMENT

JAMES C. TOOMEY, Receiver for Blundon Investment Corporation, moves the Court to vacate and set aside the judgment entered in this action, and all subsequent proceedings thereon, and to allow this Receiver to file and serve his answer, and defend on such terms as may be just, on the grounds of surprise, fraud, and that the judgment is void, all of which more clearly appears in the affidavit of James C. Toomey hereunto annexed as Exhibit "A".

/s/ _____
JAMES C. TOOMEY
Attorney at Law and Receiver
for Blundon Investment Corporation.

AFFIDAVIT OF JAMES C. TOOMEY, RECEIVER

DISTRICT OF COLUMBIA, SS:

JAMES C. TOOMEY, being first duly sworn on oath, states as follows:

On February 10, 1954, there was filed by Mary Seaman Harris in the United States District Court for the District of Columbia a complaint asking for an injunction and the appointment of a receiver. Said complaint was filed against the Blundon Investment Corporation, Ben Lindas, S. Louise Blundon and T. D. Harris. Together with this complaint was filed a motion for the appointment of a temporary receiver. On March 16, 1954, a motion was filed to dismiss the complaint. Said motion was filed by Milton E. Canter and Louis Urow as attorneys for the Blundon Investment Corporation. Opposition to this motion was filed on April 6, 1954, and on April 28, 1954, the Said Milton E. Canter and Louis Urow filed a reply memorandum to said opposition. On June 18, 1954, an order was entered denying the motion to dismiss and said order was served on the said Milton E. Canter and Louis Urow. On July 21, 1954, an answer to the complaint and a counter-claim were filed on behalf of the Blundon Investment Corporation by the said Milton E. Canter and Louis Urow. On September 10, 1954, a motion to allow counsel to withdraw was filed by Milton E. Canter and Louis Urow. The reason given in said motion was that on August 26, 1954, a suit was filed by S. Louise Blundon in the Circuit Court of Northumberland County against certain defendants, including Milton E. Canter and Louis Urow. On October 12, 1954, by order of Court, Milton E. Canter and Louis Urow were allowed to withdraw as counsel and on the same date another motion to appoint a receiver was

filed and served on the said Milton E. Canter and Louis Urow. This receiver was appointed on November 4, 1954. On January 16, 1956, this receiver was removed from said appointment and on the same day, January 16, 1956, this receiver was again appointed as receiver. On January 18, 1956 this receiver did file, by mail, a certified copy of the order of his appointment as receiver for the Blundon Investment Corporation, together with a copy of the original complaint, filed in Civil Action No. 543-54. On January 26, 1956, the Clerk of the United States District Court for the Eastern District of Virginia did notify this receiver that the complaint had been marked filed as of January 26, 1956 and given Civil Action No. 2292. Said action was taken by this receiver pursuant to Title 28, Section 754 of the United States District Code.

On October 22, 1956, at a hearing before the United States District Court for the District of Columbia, this receiver learned for the first time of the existence of the above captioned cause. It was then that he learned that the said Milton E. Canter and Louis Urow, through their attorneys, William C. Parkinson and Leith S. Bremner, had taken judgment against the Blundon Investment Corporation. The said Milton E. Canter and Louis Urow knew of the appointment of the receiver. The said Milton E. Canter and Louis Urow should have known of the existence of the filing of the complaint and order of appointment in the United States District Court for the Eastern District of Virginia at Richmond. The said plaintiffs at no time informed the Court of the existence of the receivership. The said plaintiffs at no time notified this receiver of the pending suit.

It is the opinion of this receiver that as receiver of the Blundon Investment Corporation he should have been notified of the suit and should have been served with process. It is the further opinion of the said receiver that he was entitled to come before the Court and protect the property of the Blundon Investment Corporation, which was being sought by the plaintiffs in the above captioned cause. At no time did said receiver retain either George R. Humrickhouse or Ben Lindas to

represent the said receiver.

JAMES C. TOOMEY, Receiver
for Blundon Investment Corporation

SUBSCRIBED and sworn to before me this 4th day of December, 1956.

NOTARY PUBLIC, D. C.

ORDER OVERRULING MOTIONS TO VACATE JUDGMENT AND EXPUNGE COPY OF ORDER FILED IN CLERK'S OFFICE

This cause came on to be heard on the Motion of James C. Toomey, receiver for Blundon Investment Corporation, to vacate and set aside the final judgment entered in the above entitled action on the 3rd day of October, 1956, on the grounds of surprise, fraud, and that the judgment is void, and it appearing to the Court that there was no fraud in the procurement or sufferance of the judgment and that said judgment is valid, it is

Ordered that said motion be and the same is hereby denied and dismissed. To which action on the part of the Court, James C. Toomey, receiver of Blundon Investment Corporation, objected and excepted.

And this cause came on to be heard on the motion of the plaintiffs hereto to expunge from the Clerk's Office of the United States District Court for the Eastern District of Virginia and the files and records thereof, the certified copy of order entered by the United States District Court for the District of Columbia on the 16th day of January, 1956, in the matter of Mary Seaman Harris vs. Blundon Investment Corporation, a corporation, et al, Civil Action #543-54 and copy of complaint in said civil action filed in the Clerk's Office of the United States District Court for the Eastern District of Virginia, on the ground

that the receiver failed to file a certified copy of an order entered in said matter on the 4th day of November, 1954, appointing him receiver and a copy of the complaint in said matter in the aforesaid clerk's office within the time prescribed by statute, and it appearing to the Court that the time provision of said statute is merely directory and the subsequent filing of the papers prevented the divestiture of the receiver with complete jurisdiction and control and with the right to take possession of the Virginia land, it is

Ordered that said motion be and the same is hereby denied and dismissed. To which action on the part of the Court the plaintiffs objected and excepted.

United States District Judge

Seen:

/s/ Wm. C. Parkinson
518 Mutual Building
Richmond, Virginia

p.q.

/s/ Leith S. Bremner
905 Mutual Building
Richmond, Virginia

Seen:

James C. Toomey, Receiver for
Blundon Investment Corporation
Barr Building
Washington, D. C.

APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 31 1958
Joseph W. Stewart
CLERK

No. 14,346

MILTON E. CANTER,
and
LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY,
Temporary Receiver of Defendant
Blundon Investment Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS UROW

MILTON E. CANTER

712 Barr Building
Washington 6, D. C.

Pro Se

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,346

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and
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Temporary Receiver of Defendant
Blundon Investment Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

INTRODUCTION

The brief for appellee temporary receiver makes no effort to refute the points raised in appellants' brief, seriatim or otherwise, but is rather in the nature of a plea in confession and avoidance. The first of his unnumbered points is that in contesting the award of compensation to the receiver, appellants cannot assert the invalidity of his orders of appointment, or rely upon his record of misfeasance and

malfeasance, because both the orders and the misconduct preceded appellants' intervention in the litigation. His second point is that appellants cannot complain of the court's pro tanto allocation to the payment of the receiver's fee of their contingent interest, as beneficiaries of a second trust, in the proceeds of a sale under a first trust, because the doctrine of lis pendens empowered the court to make disposition of that interest. His third and fourth points contend, respectively, that the court below did not abuse its discretion in granting him the full compensation sought, and that this Court should consider certain pleadings in another cause in another jurisdiction. These four points will be considered individually. Under a fifth heading appellants will comment upon various miscellaneous contentions, misstatements and innuendos in appellee's brief. References herein to "Brief" and to "App.", will be to appellants' main brief and to the appendix thereto, respectively.

RIGHT OF APPELLANTS TO ATTACK DECREES ENTERED PRIOR TO THEIR INTERVENTION

Appellee states that Rule 24, Federal Rules of Civil Procedure, is substantially the same as former Equity Rule 37(Appellee's Brief, 71),and relies upon cases under the old rule to support his contention that appellants could not attack decrees entered prior to their intervention in the litigation. Yet appellee must know that the very provision of the old rule upon which his argument is based -- that intervention must be in subordination to the main proceeding -- is absent from the present rule. For appellee himself cites Moore, Federal Practice, 2nd Ed., Vol. 4, Sec. 24.16, wherein the author emphasizes the significance of this omission, and declares that cases under Equity Rule 37 precluding a hearing on the merits of an intervener's claim should no longer be regarded as persuasive.

In a recent case (Security and Exchange Commission v. United States Realty and Improvement Co., 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293) the Supreme Court held that an intervener could move to vacate the approval of a petition in a bankruptcy proceeding. Actually, the fundamental equity of according interveners the privilege of attacking a prior decree in a proper case has been recognized by the United States Supreme Court from the earliest days. Thus in Harrison v. Nixon (9 Pet. 483, 9 L. Ed. 201) Mr. Justice Story permitted claimants to a fund to intervene six months after final decree, and to establish the invalidity of the proceeding. This Court, in Wolpe v. Poretsky (79 App. D. C. 141, 144, 144 F. 2 505; cert. den. 323 U. S. 777, 65 S. Ct. 190, 88 L. Ed. 621), held that intervention may be allowed even after a final decree, where it is necessary for the protection of a right. To the same effect is Pellegrino v. Nesbit (203 F. 2d 463).

This is not a case where the administration of the receivership had created or altered contract or property rights, which invalidation of the receivership could disturb, or where the interveners had slept on their rights, or where they were challenging the propriety of the main proceeding. There has been no administration, and there are no intervening rights which invalidation of the receivership could affect. And the appellants could not have been more diligent in asserting their rights. It will be recalled that appellants had no interest in the main proceeding, or in the receivership to which it gave rise. This the appellee recognized when he did not make them parties, or serve upon them copies of his appointments.

When appellants first learned of the appointment of November 4, 1954, appellee -- and the court -- did not have jurisdiction of the property which was subject to appellants' trust, since appellee had not qualified in Virginia under Title 28, Section 754, U. S. C. A. (App. 7). As late as October 20, 1956, appellants still believed, with good cause, that appellee had yet to acquire jurisdiction over that property, as is shown

by their written opposition to appellee's motion for an injunction (Id. 18, par. 2). It was at the hearing on that motion that appellants first learned that appellee had had himself removed and reappointed on January 16, 1956, and that he had thereafter, for the first time, filed the papers which were necessary to give him jurisdiction (Id. 44).

Appellants' justiciable interest in the validity of the receivership was born on October 1, 1957, when the court ruled, sua sponte, that the receiver's fee should be an expense of the sale of the property which was subject to their deed of trust, the amount of the fee to be determined after hearing upon receiver's petition for compensation. Appellants attacked the receivership in their written opposition to that petition (Id. 35-43), and attempted, but were not permitted, to do so at the hearing (Id. 53-59, passim). They had no standing to do so sooner. It would be unconscionable to hold that they could not do so at all.

Further, it may be noted that appellants contended not merely that the orders creating the receivership should be vacated as improvidently issued, but that they were utterly void (Id., 38-39, par. 7). For want of jurisdiction or fraud in procurement, orders are subject even to collateral attack (30 Am. Jur., Motions, Rules and Orders, and Id. 1957 Cum. Supp., sec. 36). If final orders can be attacked on these grounds by anyone at any time, surely these appellants, who would otherwise be without remedy, may challenge interlocutory orders issued in the very proceeding in which they intervened.

APPLICABILITY OF THE DOCTRINE OF LIS PENDENS

The contention that the doctrine of lis pendens empowered the court to apply appellants' secured interest in the property to the payment of the receiver is exceedingly far-fetched. It is fundamental that the doctrine is applicable only in a suit directly affecting title to specific property. "If no specific property is affected by the proceeding, there is nothing to which the doctrine can be applied, though the cause of

action may have arisen out of a matter involving property." (34 Am. Jur., Lis Pendens, sec. 21).

The plaintiff below is merely a tort claimant. Far from asserting an interest in specific property, she seeks only a money judgment for alleged fraudulent misrepresentations, and, as an alleged stockholder, the appointment of a receiver for alleged mismanagement (App. 1-3). Clearly the property affected by appellants' deed of trust is not the subject of the suit, and the doctrine of lis pendens is inapplicable.

Further, the court below had no jurisdiction over the Virginia property when the filing of the action allegedly actuated the doctrine. A suit cannot affect real property beyond the territorial jurisdiction of the court. (See Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65; Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 31 S.Ct. 11, 54 L.Ed. 1032). When appellee first qualified as receiver, such jurisdiction as he thereby acquired over the Virginia property was subject to the pre-existing trusts thereon.

Even if title to the property were involved in the main litigation, the doctrine of lis pendens could hardly be raised by the appellee. In the first place, that doctrine is available only to a party to the litigation claiming against a grantor. A receiver is not a party to the suit in which he is appointed (45 Am.Jur., Receivers, sec. 126). And he has no rights with respect to trust property superior to those which would be possessed by the one for whom he was appointed, were the latter acting for himself (Id. sec. 156, p. 30). In the second place, the doctrine is available only when the action has terminated in a judgment or decree affecting the property involved therein (34 Am.Jur., Lis Pendens, sec. 38). After more than four years, this action is still pending, and no such judgment or decree has been, or could be, entered.

It may be observed, in passing, that if the appellee (or, for that matter, the plaintiff) had actually believed that the doctrine of lis pendens could be invoked in derogation of possible intervening rights to the

Virginia property, he would have seen to the recordation required by the state statute (Code of Virginia (1950), 8-142), in order that no such rights could accrue to anyone. The title search submitted by appellee (App. 27-28) shows that no lis pendens was ever filed. It also shows that three other judgment liens were created after the commencement of the litigation, and that a substantial third trust was imposed after he qualified as receiver. None of these encumbrances have been challenged by the receiver.

DISCRETION OF THE LOWER COURT

It is difficult to follow the contention that the lower court had discretion to grant appellee the full compensation sought. The primary questions on this appeal are concerned, not with discretion, but with power. Thus it is axiomatic that a receiver cannot be compensated for activities under a void receivership, except, in some jurisdictions, at the expense of those who obtained the receivership. In this case, even if appellee's claim for compensation were otherwise meritorious, it should have been denied because of the invalidity of the orders upon which his activities were founded.

The order appointing the receiver on November 4, 1954, was void, because a copy of the motion therefor was not served upon the corporation (Brief 11). The order appointing the receiver on January 16, 1956, was void, because it was issued on oral motion, and because it was premised upon a misrepresentation to the court that the corporation was seeking the receivership (Id. 12-13). The order directing appellee to sell the property of the corporation was void, because it was beyond the powers conferred upon him in his appointments, because it was beyond the general powers of a temporary receiver (45 Am. Jur., Receivers, sec. 3), and because the court had no power to liquidate a foreign corporation (Brief 19). And the order appealed from, directing payment of the receiver out of the proceeds of the sale of property under deed of trust, as an expense of that sale, was void, because it displaced

vested liens on the property, infringed upon the contract between the trustees and the corporation, and contravened the statute (Code of Virginia (1950) 55-59 (13)) prescribing the priority of distributions of proceeds of a sale under a deed of trust (Brief 9-10).

However, grave abuses of discretion were also committed by the court below, and they afford still further grounds for reversal:

It appointed a receiver on the improper ground that a pending suit in a state court threatened to divest the corporation of its property (Brief 11).

It improperly entertained a motion for the appointment of a receiver by a co-defendant who was neither a creditor nor a stockholder of the corporation (Id. 12). The resulting appointment would have been improper even if the corporation had in fact consented thereto (45 Am. Jur., Receivers, secs. 10, 85). It may be observed that while the complaint also prayed for the appointment of a receiver, but on different grounds, it would not have been proper for the court to have made the appointment thereunder without a full hearing, inasmuch as the answer of the corporation fully denied the allegations of the complaint (Id. sec. 103).

It appointed a receiver upon an ex parte hearing without that clear showing of imperative necessity which the law demands (Id. sec. 90).

It granted the receiver approximately $1,500, as prayed, for an unauthorized and groundless attempt to set aside appellants' judgment on the note secured by their deed of trust (Brief 17-18). Appellee does not deny that his motion toward that end was baseless and malicious, but maintains that he was authorized to bring it under the directions in the orders of appointment that he enter his appearance in pending litigation (App. 7, 15). But this was not pending litigation. It had terminated by the entry of final judgment on October 3, 1956. (See Winkleman v. General Motors Corp., 48 F. Supp. 490, 494). When appellee filed his motion to vacate that judgment, on December 5, 1956, even the time for appeal had expired (App. 43).

It compensated appellee for alleged, and fruitless, efforts to sell the property of the corporation under an order which, as shown above, was invalid, and despite the uncontroverted evidence that appellee knew, or should have known, that the extent of encumbrances upon the property made such a sale impossible (Brief 4, 19).

And it compensated appellee for securing improvident and pointless injunctions (Id. 19).

The court committed an equally grave abuse of discretion in disregarding the serious derelictions of appellee receiver, as it must have done to award him the full compensation he requested. Appellee misrepresented to the court that the receivership was on consent; that the litigation involved the property of the corporation in Virginia; and that he could sell that property at a price in excess of the liens upon it (Brief 15). He has continued the receivership for more than three years without either accomplishment or request for termination. Of the two specific duties enjoined upon him -- to appear in pending litigation, and expeditiously to sell two tracts of land -- he completely ignored the first, and, as for the second, did not even bother to obtain an appraisal of one of the tracts. (Id. 15-16)

It was also error for the court to rule, sua sponte and without hearing, that the receiver should receive compensation, and thereafter to refuse to entertain appellants' objections to that ruling (App. 31, 48, 54), and to brush aside, as of no consequence, appellants' efforts to show that appellee's record of activities did not warrant the compensation sought (Id. 54-59). Since the degree of integrity, fidelity, and diligence of a receiver, and the extent of his accomplishments, are controlling considerations in the fixing of his compensation (45 Am. Jur., Receivers, secs. 288, 299), the utter disregard of these criteria by the court below was a manifest abuse of discretion.

These errors, both those arising from the lack of power and those arising from its improper exercise, are spread upon the record, and have been specified in appellants' main brief. They stand unrefuted.

JUDICIAL NOTICE OF PLEADINGS IN ANOTHER CAUSE

Appellants cannot agree that this Court may properly consider the documents contained in appellee's proposed Special Appendix. The doctrine of judicial notice is not applicable to pleadings in an unrelated cause in another jurisdiction. The instant proceeding is an action by an alleged stockholder, against a corporation, upon allegations of fraudulent sale of stock and of mismanagement. Appellants have no interest in it, and intervened, some three and one-half years after its commencement, to move the vacation of an injunction. The Virginia proceeding was an action by appellants against the corporation and another upon a promissory note. It has terminated in a judgment, and the Memorandum of the Court is fully set out in the record (Appellee's Appendix 7-11).

In his request that this Court take judicial notice of the "pleadings, judgments and orders" in the Virginia proceeding, appellee indicates that all these papers are to be found in his annexed proposed Special Appendix (Appellee's Brief 14). Carefully deleted therefrom, however, are Defendants' Bill of Particulars, wherein a portion of the Answer which appellee desires the Court to consider is withdrawn, and appellants' four-page Answer to Defendants' Counterclaim. Appellee's motive in seeking to introduce these selected pleadings is highly questionable.

MISCELLANEOUS CONTENTIONS

Appellee's contention that a copy of the first motion to appoint a receiver was served upon the corporation by mailing a copy to appellants as counsel (Appellee's Brief 3, 10), is erroneous. Appellants were granted leave to withdraw as counsel on October 6, 1954, the order

being filed on October 12 (App. 5). The motion for the appointment of a receiver, which was also filed on October 12, recites that a copy was mailed to appellants on October 7. However, examination of that motion discloses that it was not verified until October 12, and hence that a conformed copy mailed to appellants could not have been received before October 13. Inasmuch as new counsel had not as yet entered an appearance for the corporation, appellants had no alternative but to return the paper to the movant with the advice that they no longer represented the corporation. They had no reason to correspond with the corporation in the matter.

Appellee's contention that copies of the two orders of January 16, 1956, were mailed to the attorney for the corporation (Appellee's Brief 5), is not borne out by the record (App. 15, 16). The certificate of mailing bears no signature, name, initials, or even a signature line. Although appellants have persistently raised this objection to the validity of the appointment of January 16, 1956, the merit of that objection has never hitherto been questioned. That said attorney did not, in fact, receive a copy of the order indicating that the corporation had agreed to a receivership, is evident from his contention that the costs of the receivership should be borne by the person who sought it (App. 60). Appellee's oblique allegation that he mailed a copy of the orders of January 16, 1956, to the attorney for the corporation is interesting, however, as a recognition that Lindas was not then its attorney. Since appellee knew from the record that Lindas was not then an officer, director, or stockholder in the corporation, he must have been aware not only of the falsity of his recital in the order of appointment that the movant was president of the corporation, but also that the movant did not represent the corporation in any other capacity.

While Lindas never represented,or purported to represent, the corporation in this proceeding (Brief 13), and appellee does not have the audacity to contend that he did, appellee nevertheless attempts to infuse a doubt in the mind of this Court on this point (Appellee's Brief 10-12). Precisely what relevance there may be in the

fact that in another cause, in another jurisdiction, at a later date, Lindas appears as of counsel for the corporation (upon a single paper of an extensive record), cannot be perceived.

Completely absurd is the contention that the lower court was warranting in granting appellee the full compensation sought, because appellants did not state what they believed that compensation should be (Appellee's Brief 13). Actually, appellants advised the court that in their opinion the receiver was entitled to nothing (App. 55, 59).

Appellee impugns the motive of appellants in failing to print that portion of the Memorandum Opinion (upon his motion to vacate their judgment) that considered, and denied, their counter-motion to expunge the papers filed by him on January 26, 1956, to qualify in Virginia (Appellee's Brief 10). That ruling is not relevant to this appeal. Appellants are not contending that appellee did not thereby acquire jurisdiction over the Virginia property of the corporation. They say only that the lower court did not thereupon acquire the power to derogate appellants' pre-existing deed of trust.

Respectfully submitted,

LOUIS UROW

MILTON E. CANTER

712 Bar Building
Washington 6, D. C.

Pro se

APPELLANTS' PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 27 1958
Joseph W. Stewart
CLERK

No. 14,346

MILTON E. CANTER,

and

LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY,

Temporary Receiver of Defendant
Blundon Investment Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS UROW

MILTON E. CANTER

712 Barr Building
Washington 6, D. C.

Pro Se

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,346

MILTON E. CANTER and LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY, Temporary Receiver of
Blundon Investment Corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Appellants, in proper person, petition the Court to grant a rehearing in the above-entitled cause, and upon a rehearing and further consideration hereof that the judgment entered herein on June 12, 1958, be reversed and entered in favor of petitioners, and for grounds of this petition state as follows:

1. The judgment of affirmance contravenes the rights conferred upon appellants by a controlling statute of the state where the land which is subject to appellants' deed of trust is located. This point was raised

in appellants' brief below,[1] but time did not permit its exposition upon oral argument.

The relevant portions of the applicable Virginia statute are as follows:

"Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights, and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

* * * * * *

"(13) The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission of five per centum of the gross proceeds of sale, secondly, to discharge all taxes, levies and assessments ...., thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed..."[2]

The orders appealed from provide that the compensation of the receiver shall be an expense of the sale of the Virginia lands by the trustees.[3] And the court explicitly ruled that the receiver's fee should be paid out of the proceeds of such sale, and should not be assessed against the parties personally.[4]

The "expenses of executing the trust", within the meaning of the statute, clearly are limited to customary expenses, such as costs, lawful disbursements, and extra allowances. Manifestly, they do not include a fee awarded a foreign receiver of the grantor, who in no wise participated in the execution of the trust. Similarly, expenses of sale

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1 Appellants' Reply Brief, page 7.

2 Code of Virginia (1950), Section 55-59; underscoring supplied.

3 Appellants' Appendix, page 45.

4 Appellants' Appendix, pages 48-49.

under the trust, to which the lower court allocated the compensation of the receiver, are confined to publication costs, auctioneer's fees, and like expenditures necessary to effect a valid sale. The fee of the receiver could no more be an expense of contemplated sales by the trustees than it could be an expense incurred by them in executing the trust. If, as is quite clear, the trustees could not have properly paid the receiver's fee as an "expense of executing the trust", the lower court could not by fiat make that fee such an expense, and, in effect, direct the trustees to disregard the mode of distribution enjoined upon them by statute. For the court had no power to derogate from the sovereign right of the state, duly exercised in the statute under reference, to determine the priority of distribution of the proceeds of the sale of land under deed of trust.

In a recent case, the United States Court of Appeals for the Sixth Circuit declared it was well settled that the effect of a mortgage lien must be determined by the law of the state in which the property is located, and that the appointment of a federal receiver could not affect the priority granted a lien under state law.[5] And in the leading case upon this point, Mr. Justice Brandeis held that "a receiver appointed by a federal court takes the property subject to all liens, priorities, or privileges existing or accruing under the laws of a State."[6] It is respectfully submitted that since the orders appealed from are inconsonant with the controlling state statute, they should not have been affirmed.

2. It is respectfully suggested that the affirmance of the orders below, which subjected both a first trust held by another, and appellants'

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5 In re American Fuel & Power Co., 151 F. 2 470, 481; affirmed Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 67 S. Ct. 237, 91 L. Ed. 162. In affirming, the Court stated (329 U. S. 156, 161) that the validity of claims of creditors must be determined by reference to state law. And in a concurring opinion, in which two other justices joined, Mr. Justice Frankfurter observed (329 U. S. 156, 169) that the law that fixes legal consequences is the law of the several states.

6 Marshall v. New York, 254 U. S. 380, 385, 41 S. Ct. 143, 145, 68 L. Ed. 315.

second trust, to the payment of the receiver's fee, was predicated neither upon the theory that the burden of receivership expenses could properly be imposed upon parties having no interest in the receivership, nor upon the theory that the appointing court had the power to displace vested liens. For the United States Supreme Court long ago found both such theories unsupportable,[7] and cases applying the law there enunciated are legion.[8] Rather, it appears that the orders were sustained upon the theory that the doctrine of lis pendens rendered appellants' trust subject to the disposition of the court below, because, while the trust was created prior to the appointment of the receiver, it was imposed subsequent to the institution of the litigation wherein appointment of a receiver was sought. This contention was strenuously urged at the hearing by counsel for the plaintiff in the principal action. Since plaintiff had filed no brief, and the time allotted to appellants for argument had been exhausted, appellants had no opportunity to reply.

Even if there were some merit to the argument of lis pendens, which appellants deny, it has no relevance here because of a fact which may well have escaped the attention of this Court. The sale to which the receiver must look for the payment of his fee, under the orders appealed from, is not a sale under appellants' deed of trust. It is a sale under a senior trust, which admittedly antedated by many years the commencement of the litigation in which the receiver was appointed. The burden of payment was placed equally upon the beneficiary of the first trust and upon appellants, as beneficiaries of a second trust. But it is the trustees under the first trust who are required to make payment to

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7 Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 S. Ct. 406, 52 L. Ed. 528; Kneeland v. American Loan Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

8 Numerous citations are set forth in an excellant annotation in 104 A. L. R. 990. In the most recent federal case there cited, the court said: "It would be obnoxious to good conscience and taking the property of the loan company without due process to subject the first mortgage to charges and expenses of the receivership." (Nicholson v. Western Loan & Building Co., (9 Cir.), 60 F. 2 516, 517, cert den. 288 U. S. 605, 53 S. Ct. 396, 77 L. Ed. 980.)

the receiver, and as to that trust there can be no suggestion of the doctrine of lis pendens.

In reply to the contention of the plaintiff, it may be observed that a valid encumbrance can be created pendente lite. Thus in a recent Kansas case, which differs from the instant case mainly in that no receivership was involved, the purchaser of a lease, upon learning of the misrepresentations of the seller, sued to recover payments made and for damages, joining as party defendant a bank that was acting as escrow agent. While the suit was pending the seller assigned the lease to the bank as security for a loan. In a foreclosure suit by the bank the purchaser intervened, seeking to subordinate the bank's claim to his own under the doctrine of lis pendens. The court held that since the claim of the purchaser was not against the property of the seller, the doctrine was inapplicable.[9]

But whatever the rights of the plaintiff may be as a consequence of the doctrine of lis pendens, they are neither involved in this appeal nor available to the receiver. For the rights of a receiver commence with his appointment, and do not relate back to the filing of the bill seeking his appointment. In Illinois Steel Co. v. Putnam, a stockholder, like the plaintiff below, filed a bill seeking the appointment of a receiver upon allegations of mismanagement. Thereafter, but prior to the appointment of the receiver, the corporation surrendered to a creditor materials previously purchased but not paid for. The lower court ruled that the receiver was entitled to the property. The Court of Appeals reversed, holding that only when the receiver was appointed did the property of the corporation come into the custody of the court.[10] And, referring to the effect of the appointment of a receiver, the United States Supreme Court has said: "...(T)he utmost effect of his appointment is to put the property from that time into his custody, as an officer

9 Davidson v. McKown, 157 Kan. 217, 139 P.2 421.

10 Illinois Steel Co. v. Putnam (5 Cir.) 68 F. 515.

of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right to possession in the property."[11]

It is generally recognized that the doctrine of lis pendens is not available to receivers.[12] The doctrine can be invoked only by a party to the litigation, and then only after the litigation has established in his favor a proprietary interest in specific property, which he has asserted in the proceeding.[13] A receiver is not a party to the litigation in which he is appointed.[14] The instant litigation is still pending. And it does not seek, and could not possibly result in, a determination that the receiver, or even plaintiff stockholder, has a proprietary interest in specific property of the corporate defendant.

It follows that the doctrine of lis pendens cannot in this case warrant a departure from the general rule that a trust which was in existence prior to the appointment of a receiver cannot be subjected to the payment of the expenses of the receivership, particularly when the beneficiaries of the trust neither sought nor benefited from the receivership. It is respectfully submitted that if the doctrine of lis pendens is inapplicable, the orders appealed from should not have been sustained.

3. Finally, appellants are constrained to urge that not only upon the applicable law, but upon the inherent equities, the orders appealed from should have been reversed.

The receiver was appointed not upon the allegations of mismanagement set forth in the complaint, but upon the motion of a co-defendant alleging that a suit in a state court threatened to divest the

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11 Union National Bank of Chicago v. Bank of Kansas City, 136 U. S. 223, 236, 10 S. Ct. 1013, 34 L. Ed. 341. See also Powell v. Maryland Trust Co. (4 Cir.), 125 F. 2 260, 271, cert. den. 316 U. S. 671, 62 S. Ct. 1041, 86 L. Ed. 1746, rehearing den. 316 U. S. 711, 62 S. Ct. 1273, 86 L. Ed. 1777.

12 54 C.J.S., Lis Pendens, sec. 16, page 582.

13 54 C.J.S., Lis Pendens, sec. 43, page 617; 34 Am. Jur., Lis Pendens, sec. 21.

14 45 Am.Jur., Receivers, sec. 126.

corporation of its property. When that suit was dismissed, the receivership should properly have been vacated. For it was apparent from the outset that a receivership could accomplish nothing for the benefit of the plaintiff or general creditors, since judgment and trust liens of record greatly exceeded the value of the lands of the corporation.

The motive of the receiver in continuing the receivership for more than three years can be attributed only to a desire for self aggrandizement. In the face of the heavy encumbrances upon the property, he represented to the court that the corporation had a substantial equity therein, and thereupon obtained a series of injunctions against secured creditors of the corporation, and an order permitting him to enter into a contract of sale, which he was unable to execute. On the other hand, in utter disregard of the directions in the orders of appointment, he failed to appear on behalf of the corporation in any of the pending causes to which it was party. And it may be recalled that the existing receivership is itself void, having been created upon oral motion without notice to the corporation, and having been founded upon the misrepresentation of the receiver that the corporation was consenting thereto.

Upon a record that thus demonstrates the invalidity of the receivership, the derelictions of the receiver, and his complete lack of accomplishment, the lower court not only awarded the receiver the full compensation prayed, but, in effect, made its payment a lien upon the property of the corporation superior to that of secured creditors whose liens had vested prior to the appointment of the receiver, and who had no interest whatever in the receivership. Particularly unjust was the allowance to the receiver of approximately $1500 for his efforts to set aside appellants' judgment against the corporation. His motion toward that end was brought without the authorization of the appointing court, and was denied as wholly without merit. The receiver failed to assert a single proposed defense to any aspect of the claim upon which the judgment was entered. Yet appellants, who had already been put to the expense of defending the

motion, were now required, together with the beneficiaries of the first trust, to reward the receiver for bringing it.

It is respectfully submitted that upon considerations of equity and justice neither the amount of the award nor its incidence upon innocent secured creditors can be sustained, and that, for that additional reason, the orders appealed from should not have been affirmed.

Respectfully submitted,

LOUIS UROW

MILTON E. CANTER

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Pro Se

CERTIFICATE OF GOOD FAITH

I do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

LOUIS UROW

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,346

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUL 17 1958
Joseph W. Stewart
CLERK

MILTON E. CANTER,
and
LOUIS UROW,

Appellants,

v.

JAMES C. TOOMEY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO APPELLANTS' PETITION FOR REHEARING

Comes now Appellee, by his attorney, and opposes Appellants' Petition for Rehearing and for grounds therefore states as follows.

Appellants' first point is predicated on a view that Section 55-59 of the Code of Virginia (1950 ed. as amended) provides mandatory rights and duties upon parties to a deed of trust, which no court of competent jurisdiction may alter. The point is not well taken. This statute provides only the minimum rights and duties of parties to a deed of trust. It contains duties and rights which, if the deed itself does not contain, are implied by operation of law. Part (13) of the statute, upon which Appellants rely provides the minimum duties of a

trustee and does not purport to convey rights upon beneficiaries to a deed of trust, other than the discharge of debts secured by the deed according to their priority. Appellants, in effect, deny the authority of a Court having jurisdiction of both the subject matter and the parties, to determine what is an expense in executing the trust. The Court in the instant case determined that the Receiver's fee should be an expense of the sale.

Appellants' second point is in two parts. The first, contends that the doctrine of lis pendens is not applicable to a receiver. The second, contends that a mortgage or deed of trust executed subsequent to the initiation of litigation but prior to the actual appointment of a receiver is superior to any claim of the receiver for a fee out of said assets.

Lis pendens is a doctrine of constructive notice. It is unnecessary where actual notice is present. In the instant case, Appellants were counsel for the defendant corporation at the time litigation was instituted. In response to this litigation they filed a motion to dismiss the complaint. Thus they cannot deny that they were on actual notice that a complaint for appointment of a receiver of the assets of the defendant corporation had been filed, and listed therein was the property to which Appellants became, subsequently, beneficiaries under a deed of trust. Thus at the time of becoming beneficiaries under the deed of trust, Appellants knew (on actual notice) that a receiver might be appointed; that he would look to the assets of the corporation for his fee.

It therefore becomes immaterial whether or not lis pendens is available to a receiver.[1] The second phase of Appellants' point is also not well taken, for adherence to it would deny the rule that one who takes an interest in property which is the subject matter of litigation, takes subject to any disposition which a Court may make as to that property.

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[1] Holding that it is available, Keith Lumber Co. v. Houston Oil Co. of Texas, 5th Cir. 257 F. 1 (1919). Gaynor v. Blewett, et al., infra.

The case of Gaynor v. Blewett et al., (Sup. Ct. Wisc. 1892) 82 Wis. 313, 52 N. W. 313, is illustrative of this rule. In 1887 a mortgagee petitioned the court to foreclose on his mortgage. In January, 1891, the mortgagor leased the premises to one Smith for a period of one year. In May, 1891 a receiver was appointed. The receiver sought to eject the tenant or in lieu pay a reasonable tenant fee. The tenant objected claiming that he had contracted for the tenancy for a term, that the mortgagor had been paid, that lis pendens was not applicable to a receiver. The court held that the doctrine of lis pendens was applicable as against the tenant, and that the tenant leased the property while on constructive notice of the pendency of the litigation.

In the cases upon which Appellants rely, the mortgagees or beneficiaries under the deeds of trust, became such, prior, to the institution of any litigation.[2] In Illinois Steel Co. v. Putnam, 5th Cir., 68 F. 515, the chattel mortgage came into being one month before litigation was instituted. The Court did not reach this issue though, holding that the complaint did not mention the property; that the complaint was not one to enforce a debt or foreclose a lien or liquidate a corporation but rather one to better the management so that business might prosper. No thought of the termination of the corporation was involved.

Appellants' cite no case holding that a mortgagee who becomes such after the institution of litigation involving that property, may not be held liable for fees of a receiver appointed subsequent to the vesting of the mortgagee's interest, where the litigation prayed for the appointment of a receiver and the mortgagee had actual knowledge of this litigation.

Appellants' third point, involving the alleged misconduct of the receiver was raised, at some length, in Appellants' Brief, and at oral argument. Nothing new is added. What Appellee has said in his brief and contended in oral argument adequately answers this contention of Appellants.

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2 Nicholson v. Western Loan & Building Co., 9th Cir. 60 F. 2d 516.

On page four of their petition for a rehearing, Appellants suggest that they should come within whatever protection might be afforded to the first trust holder. The receiver's fee was proportioned equally between the beneficiaries of the first trust and those of the second trust, namely, Appellants. The first trust beneficiaries did not appeal, and as to them the decision is final. Appellants' rights are determined, not by who conducts the sale, but by a determination of when they took their interest, and whether any litigation involving that property was then in existence. Having taken an interest in property which was the subject matter of litigation, they are now bound by decrees of the Court as to that property.

It is respectfully prayed that the Petition for Rehearing by Appellants be denied.

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